Public Utilities

FORTNIGHTLY

August 1, 1940

PUBLIC UTILITIES REPORTS, INC.
PUBLISHERS

"I don't like that sign, Mr. Watts!"

"YOU mean that sign in the Main Street window? What about it?"

"It says 'Silex with Stove—$4.95'. Why, that stove alone is worth a window!"

"Wha-at? A stove's a stove, isn't it?"

"Not that stove. You see, it's SELF-TIMING!"

"What does that mean?"

"It means that the water and the coffee are kept together just the right number of seconds *to make perfect coffee every time.*"

"But doesn't any coffee maker do that?"

"That's what *you* think! No other coffee maker has a self-timing stove. It's a patented feature of Silex. So you can't guarantee perfect coffee every time with any other brand!"

"But you *can* guarantee it with Silex?"

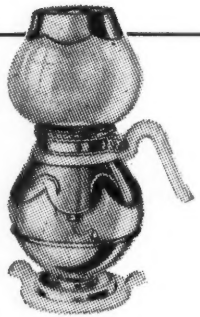
"I'll say you can, Mr. Watts—and you SHOULD!"

"Then I'll say we will! Get hold of that display man and the advertising manager. We're going to feature SELF-TIMING SILEX!"

"That's the stuff, Mr. Watts. And don't forget it's the self-timing stove that makes women use their Silex every day—that's an average of 87 KWH a year per meter!"

Perfect Coffee Every Time!

That's the tip-off. Your Silex representative would like to help you plan a promotion on this exclusive Silex feature that will put more KWH on your load.



Every Electric Silex has a Self-Timing Stove

Just shut off the current when the water gets up and Silex brings it down . . . as perfect coffee! It's an exclusive Silex feature—patented so it can't be copied. Good reason why women want the stove when they buy Silex (and that boosts sales totals—electric models priced from $4.95 to $29.95). Good reason, too, why they *use* the stove when they take it home. (And that adds KWH to your load!) Illustrated—"Saratoga" Electric, $6.45 retail, 8-cup size, ivory trim.

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Financial Editor—OWEN ELY

Public Utilities Fortnightly

VOLUME XXVI *August 1, 1940* NUMBER 3

Contents of previous issues of PUBLIC UTILITIES FORTNIGHTLY *can be found by consulting the "Industrial Arts Index" in your library.*

Advertising Section

¶ *This magazine is an open forum for the free expression of opinion concerning public utility regulation and allied topics. It is supported by subscription and advertising revenue; it is not the mouthpiece of any group or faction; it is not under the editorial supervision of, nor does it bear the endorsement of, any organization or association. The editors do not assume responsibility for the opinions expressed by its contributors.*

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Pages with the Editors

At a time when almost everything that one reads and hears is devoted either to the horrors of war or the terrors of politics, we promised ourselves that we would not burden our readers with any additional editorializing on either subject. But we cannot resist observing that the utilities will certainly be thrust into the election campaign, if the Republicans decide to use any of the slogans which thoughtful Democratic friends have been suggesting to them here in Washington. Among these are: "Volt for Wilikie," "Watt America Needs Is a High Tension President!"

We pass these along, not because we think they are particularly good, but just to show what is in the air, or—should we say?—on the air.

And then there is the one about the Middle West farmer—a life-long Democrat who allowed that he hadn't made up his mind which way he was going to vote, but he was sure that one Democrat is still worth two Republicans. When asked to explain, he pointed out that the party of Jackson had recently "swapped" one Willkie for two former members of the GOP (Stimson and Knox). "And danged if I don't think," he said, "the Republicans got the best of the bargain at that."

Be that as it may, as these lines are written the "great secret" is at last known that there is at least one member of their party upon whom the Democrats are going to stand pat, despite the tradition to change. And so it looks as if the campaign may be decided on the basis of whether there is enough alternating current flowing through the electorate.

Getting back to our proper field of utility regulation, one of the oddest characteristics of commission control is that the more it is criticized the more it seems to be extended. Often the very social reformers who say that utility regulation is a failure, in the next breath put forth suggestions for the regulation of new industries.

Beginning with the railroads, and extending through various lines of common carrier transportation, and the gas, electric, and telephone utilities, the basic principle of regulation (*i. e.*, controlled monopoly plus fixed prices, plus restricted profits) has been urged for a host of borderline industries, such as coal mining and the marketing of agricultural products. In this issue we present a review of an interesting volume on the subject of "Milk Distribution As a Public Utility" (see page 172).

ASEL R. COLBERT

He urges more SEC-state commission coöperation in the interest of economical and effective regulation.

(See Page 149)

If regulation is a failure, then it is probably the most popular failure we have ever had in the mechanics of political science since the invention of commissions themselves. The situation recalls the argument of an old-fashioned free-trade Southerner in Congress: "I believe that tariff protection is wicked, fallacious, and unsound; and I also believe that the commodities of my state are entitled to a fair share of it as compared with Yankee products."

But when we analyze much of the criticism of commission regulation of utilities, it seems to be based on a disappointment that regulation has not proved to be perfect and self-executing, rather than on any genuine conviction that regulation should or could be replaced entirely with some other form of administrative control. When we witness the ingenious and intelligent experiments in regulation being conducted in Washington, D. C., in New York, Wisconsin, and California—

just to mention a few instances—it is apparent that far from being a moribund theory or a static device of government, commission regulation is just about as progressive as any of the arts and sciences.

IN the leading article in this issue, FRANCIS X. WELCH, of our editorial staff, pays tribute to the resourcefulness and objectivity of these experiments. "Some day," says MR. WELCH, "the formula for a regulatory 'cure-all' may emerge; it is not beyond the realm of comprehension." Along this line the author suggests a formula of his own in the shape of a plan for a consumer-government-labor partnership with utilities.

NOT the least troublesome of regulatory problems is the conflict between the state and Federal commissions. It was vexing enough back in the days when there was only the Interstate Commerce Commission in Washington to collide with the state boards over the regulation of railroads. But now that we have the FPC, the FCC, and the SEC all exercising functions which tend to overlap and undercut the authority of the state commissions, it is not surprising that a spokesman for the state commissions occasionally speaks up on the subject.

THE article entitled "SEC Limits State Jurisdiction" was written by the chief of the accounts and finance department of the public service commission of Wisconsin, ASEL R. COLBERT (see page 149). MR. COLBERT joined the staff of the Wisconsin commission in 1931, after considerable experience as a staff investigator of the Federal Trade Commission in the public utility inquiry under the so-called Walsh resolution of 1928. Prior to that MR. COLBERT, who studied accounting with Pace and Pace at La Salle Extension University, had been active in railroad accounting and income tax accounting.

THE Constitution, according to one learned Supreme Court Justice, who should know, "is what the Supreme Court says it is." If that sounds a little cynical, it must be remembered that the Constitution is the highest law of the land and the Supreme Court is the highest tribunal for its interpretation. Somewhat along the same line, there is a growing belief in Washington that "integration" under the Holding Company Act is going to prove to be just about what the SEC says it is. Theoretically, of course, the Supreme Court could make revisions and, practically, it may make some in the forthcoming interpretations of the SEC. But, for some reason or other, observers in the nation's capital do not expect that the text and standards finally decided upon by the SEC as to what constitutes an "integrated public utility holding company" are going to be seriously disturbed in the high Federal courts.

AUG. 1, 1940

HERBERT COREY

This man made Chairman Frank late for a lawn party.

(SEE PAGE 141)

So far the attitude of the SEC on this question has been a source of conjecture and uncertainty. Utility executives faced with the necessity for complying with the celebrated § 11 are asking such basic questions as: (1) What concrete circumstances would justify continuation of holding company control of more than one "integrated" system; or (2) what does the word "adjoining" mean with reference to states in which such integrated systems must operate?

UNTIL a short while ago, the SEC had shown no discernible haste in announcing such standards or in clearing up such doubts. Very recently, Washington observers have sensed a rather sudden psychological shift. There seems to be a new atmosphere around the SEC—a feeling that there is need for immediate interpretation of "integration" standards. It is expected that a fairly comprehensive test case will result in the near future.

WITH an eye to obtaining some clue as to which way the SEC might jump, our well-known contributor, HERBERT COREY, Washington author and journalist, undertook to interview Chairman Frank and the article in this issue (page 141) entitled "SEC Prepares to Make Little Ones Out of Big Ones" is the result. The latest indications are that the SEC is going to write its own prescription for all the holding companies under § 11, and the medicine may prove bitter.

THE next number of this magazine will be out August 15th.

The Editors

In This Issue

In Feature Articles

In Financial News

In What Others Think

In The March of Events

In The Latest Utility Rulings

PREPRINTS FROM PUBLIC UTILITIES REPORTS

Various regulatory rulings by courts and commissions reported in full text, pages 1–64, from 34 PUR(NS)

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Town of Albion.....Albion, Indiana
Pairpoint Corporation.....New Bedford, Mass.
Charleston Navy Yard.....Charleston, S. C.
U. S. Naval Academy.....Annapolis, Md.
Metropolitan Life Insurance Co....New York City
Park Chester Housing Development
Griesdieck Western Brewery.....Belleville, Ill.
Minot Normal School.....Minot, N. D.
Southland Paper Mills.....Lufkin, Texas
Bethlehem Steel Company.....Lebanon, Penna.
Norfolk Navy Yard.....Norfolk, Va.
Fairmont City Light Co.....Fairmont, Minn.
Evenson and Levering Company....Camden, N. J.
Socony Vacuum Oil Company.....Brooklyn, N. Y.
City of Bellefontaine.....Bellefontaine, Ohio
Gallinger Hospital.....Washington, D. C.
Colorado State Agricultural College
Fort Collins, Colo.
Navajo Agency.....Ft. Defiance, Arizona
Victor Chemical Company....Mt. Pleasant, Tenn.
McChord Field, U. S. Army....Ft. Lewis, Wash.
B. F. Goodrich Company.....Clarksville, Tenn.
Canadian National Railways. Winnipeg, Man., Can.
Carnation Compny.....Sherbrooke, Quebec, Can.
Alexandria Steam Generating Co...Alexandria, Va.
South Porto Rico Sugar Company
Santa Domingo, Dom. Rep.
George Ziegler Company.....Milwaukee, Wis.
Atlas Powder Company.....Stamford, Conn.
Colorado State Capitol.....Denver, Colo.
Hercules Powder Company.....Hercules, Del.
U. S. Military Academy.....West Point, N. Y.
Container Corporation of America
Circlesville, Ohio
Commodore Perry Housing Project...Buffalo, N. Y.
DeKalb State Teachers College.....DeKalb, Ill.
United States Shoe Corp.....Norwood, Ohio
The May Company.....Cleveland, Ohio
United States Naval Hospital...San Diego, Calif.
Frankford Arsenal.....Philadelphia, Penna.
Central Park Pumping Station.....Chicago, Ill.
Virginia Public Service Co.....Hampton, Va.
Atlas Powder Company.....Atlas, Mo.
City of Fairmont.....Fairmont, Minn.
Froedtert Grain and Malting Co..Milwaukee, Wis.
Sonoco Products Company.....Garwood, N. J.
Sheridan Brewing Company....Sheridan, Wyoming
City of Fort Collins.....Fort Collins, Colo.
Ingenio Riogaila....Buenaventure, Columbia, S. A.
South Carolina Electric and Gas Co....Parr, S. C.
American Woolen Company.....Fulton, N. Y.
Keystone Public Service Company. Oil City, Penna.
Alabama Power Company.....Chickasaw, Ala.
Pennsylvania Power and Light Co.
Harrisburg, Pa.
Holyoke Gas and Electric Co.....Holyoke, Mass.
Durkee Famous Foods.....Chicago, Ill.
Blanton Company.....St. Louis, Mo.
Continental Diamond Fibre Co..Bridgeport, Penna.
Westinghouse Electric and Manufacturing
Company, Lima, Ohio
Libby, McNeill and Libby.....Chicago, Ill.
Vanadium Corporation.....Naturita, Colo.
Philadelphia Electric Company....Chester, Penna.

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Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

EDITORIAL STATEMENT
Industrial News Review.

"Wages and hours have become little more than lobbyists' footballs."

STATEMENT
Resolution of Railway Labor Executives' Association.

"There is absolutely no scarcity of skilled labor for the national defense program."

EXCERPT
PWA press release.

"The gigantic task of rebuilding America charged to the Public Works Administration seven years ago is practically complete."

EVERETT M. DIRKSEN
U. S. Representative from Illinois.

"I recognize that the Tennessee Valley Authority and the Tennessee project must go on, but it must not go on indiscriminately."

WENDELL L. WILLKIE
Republican presidential nominee.

"Now let's give TVA a real and honest chance and see what it can do or cannot do for the benefit of all the people."

W. GIBSON CAREY, JR.
Former president, Chamber of Commerce of the United States.

"... let us never forget that the day is past when we can expect that men and women in government automatically will understand business enterprise and protect it."

CARL E. BAILEY
Governor of Arkansas.

"Inequality of opportunity has not occurred because of any failure on the part of sovereign states. It has occurred on the other hand because of national policies which created privilege and protected monopoly."

THOMAS E. DEWEY
New York District Attorney.

"Small enterprises are the beginnings from which great institutions grow. They are the nourishing feeders of our whole economy. A normal government, pursuing healthful policies, would foster the growth of such enterprises rather than restrain and destroy them."

ALLAN SPROUL
First Vice President, Federal Reserve Bank of New York.

"The banking system, as we know it, is a part of our democratic system. It has some of the weaknesses and some of the strength of that system, but we have come to a time when former weaknesses can no longer be tolerated and what was strong enough is no longer sufficient."

ROBERT A. TAFT
U. S. Senator from Ohio.

"We must encourage men to go ahead with confidence that the government will not regulate them to death by fixing all wages, hours, prices, and practices, or by taking away in taxes all the money which may be made in profits."

PAUL V. McNUTT
Federal Security Administrator.

"The one thing they [Wall Street frontiersmen] don't seem to grasp is that the real genius of the American people has always consisted largely in their ability to coöperate, and that government is the greatest coöperative enterprise ever devised by the mind of men."

WALTER C. BECKJORD
President, American Gas Association.

"Its [gas industry] nature, from its beginning over one hundred years ago, has changed completely. From the original manufactured gas, over 90 per cent of the gas sold now is natural gas. Its transformation and growth has been due to the same thing which has accounted for the survival of every industry—attacking problems in an intelligent way."

ALLAN M. POPE
President, First Boston Corporation.

"If, instead of the idle uninvested funds of our citizens, it should happen that these vast public sums are to be used directly to purchase manufacturing plants or to finance them and control them, then we have what has been described as a sixth column, for once government controls our industry we cease to be a country of free enterprise."

PAUL B. McKEE
President, Pacific Power & Light Company.

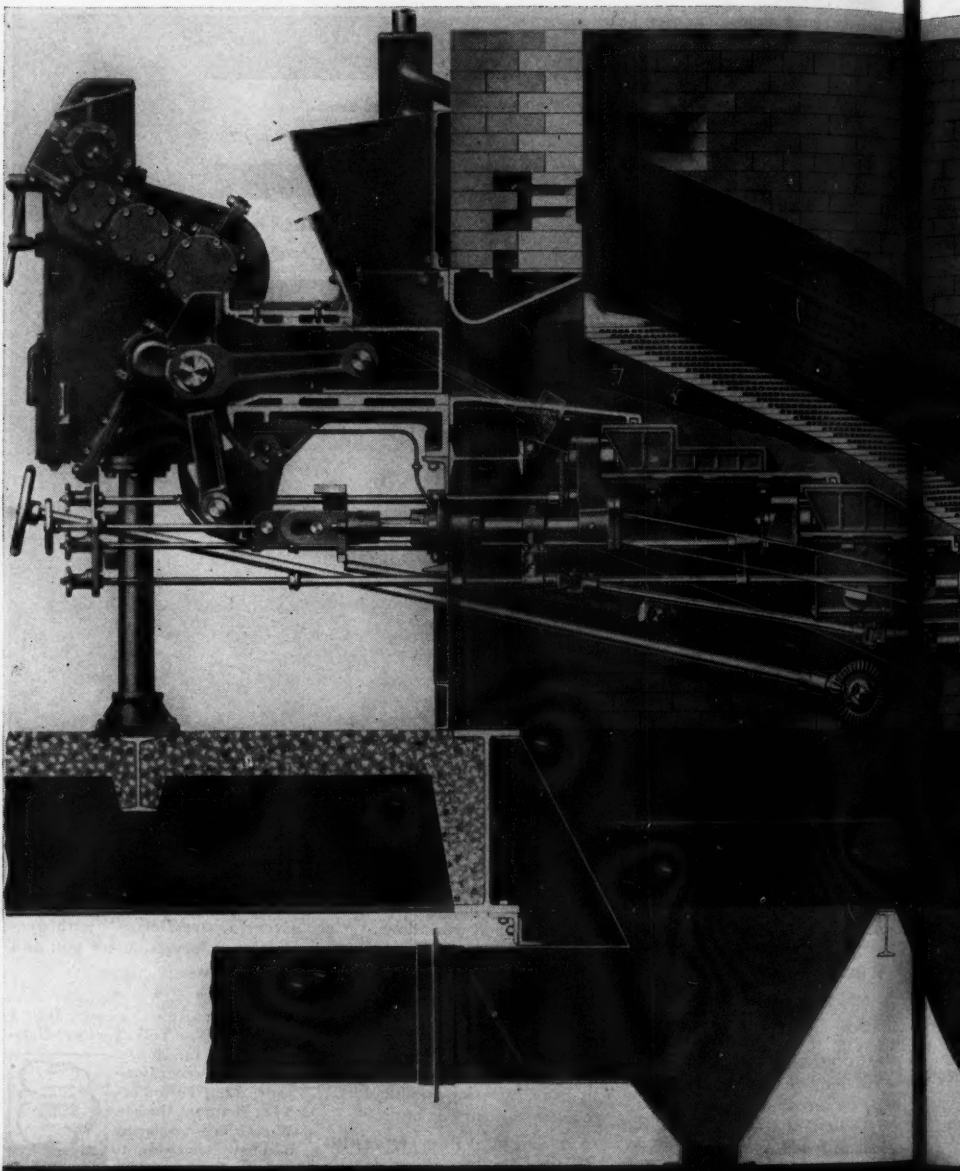
"I believe it to be a responsibility of American citizenship to oppose the efforts of any group bent on destroying a legitimate private industry through tax-free, government-subsidized competition, because if one group can succeed in doing this to one industry, then the same kind of group and the same tactics can be used to destroy all free enterprise."

PHILIP C. EBELING
Past President, United States Junior Chamber of Commerce.

"Political liberty cannot be used for bread and clothing. We must devise the economics to accompany liberty. That is the large task that faces my generation. We must find out the measures necessary for further development of the system of free enterprise; to learn how economic opportunity, upon which free enterprise must rest, can be made equitably available for every able-bodied man."

EDITORIAL COMMENT
Phoenix [Ariz.] Gazette.

"It is extremely unlikely that the country will permit a return to the old order of rampant competition and underhanded business methods. That being true, it is to the advantage of big business men to hasten the process of transition and get it over with, rather than to prolong the period of uncertainty of which they complain and for which they alone are responsible."



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This 2½-pound first-stage bucket is capable of developing more than 600 horsepower. Steam pressure, 1200 pounds; temperature, 950 F

THE present-day turbine bucke is in itself the highest tribut that can be paid to the designer, th metallurgist, and the operating eng neer. For in it are combined the result of 40 years of intensive research an development. ¶ Turbines. We know of no other machine in which tem perature and stress are combined i such a torturous union. Where steam is admitted at a temperature ho enough to set fire to wood, and ex hausted a fraction of a second late too cool for a comfortable bath. An the buckets—hundreds of them—move faster than the speed of sound Those are conditions with which th ingenuity of man has had to deal ¶ Yet, the electrical industry ha learned to expect the turbine t operate more reliably and efficiently and do more work, with each new design. And that is our right. We hav made it so through the close co-opera tion of builder and user. ¶ As you look at the record of the industry, look also at the record of General Electri turbine-generators. There is hardly a better criterion of electrical progress

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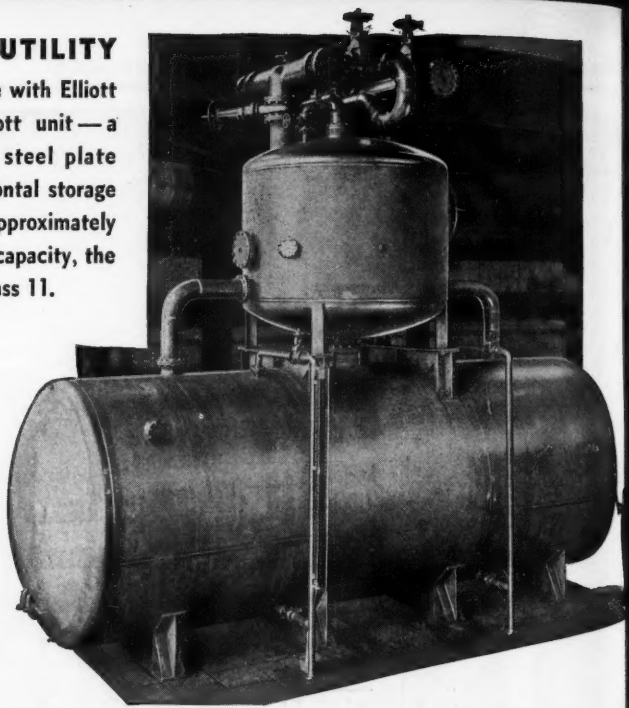

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Utilities Almanack

AUGUST

1	Th	¶ *League of Iowa Municipalities will hold convention, Council Bluffs, Iowa, Aug. 18–20, 1940.*
2	F	¶ *Appalachian Gas Measurement Short Course will be held, University of West Virginia, Morgantown, W. V., Aug. 19–21, 1940.*
3	Sa	¶ *International Association of Electrical Inspectors, Southwestern Section, will hold annual meeting, Santa Barbara, Cal., Aug. 26–30, 1940.*
4	S	¶ *National Association of Broadcasters opens annual convention, San Francisco, Cal., 1940.*
5	M	¶ *American Society of Mechanical Engineers will hold fall meeting, Spokane, Wash., Sept. 3–6, 1940.*
6	Tu	¶ *Pennsylvania Electric Association will hold convention, Bedford Springs, Pa., Sept. 4–6, 1940.*
7	W	¶ *Illuminating Engineering Society will hold annual meeting, Spring Lake, N. J., Sept. 9–12, 1940.*
8	Th	¶ *Rocky Mountain Electric League will convene for annual meeting, Albuquerque, N. M., Sept. 9–11, 1940.*
9	F	¶ *National Institute of Municipal Law Officers will convene, Philadelphia, Pa., Sept. 9–13, 1940.*
10	Sa	¶ *The Wisconsin Utilities Association, Accounting Section, will hold annual convention, Green Lake, Wis., Sept. 16, 17, 1940.*
11	S	¶ *American Transit Association will hold annual convention, White Sulphur Springs, W. V., Sept. 22–26, 1940.*
12	M	¶ *Indiana Electric Association will convene for session, French Lick, Ind., Sept. 25–27, 1940.*
13	Tu	¶ *The Empire State Gas & Electric Association will hold meeting, Rye, N. Y., Sept. 26, 27, 1940.*
14	W	¶ *American Public Works Association will hold convention, Detroit, Mich., Sept. 30–Oct. 2, 1940.*

From a painting by Peter Helck *From Elsie Hafner, N. Y.*

"Keeper of the Gates"

Public Utilities

FORTNIGHTLY

VOL. XXVI; No. 3 AUGUST 1, 1940

WHY NOT A CONSUMER-GOVERNMENT-LABOR

Partnership with Utilities?

A community of interest with its customers, employees, and the government, according to the author, is the only way to end the interminable controversy that has plagued the utility business for many years. At present, the conflicting interests of consumers in low rates, of utilities in more income, of government in new taxes, and employees in more wages, necessarily breed trouble. Well-intended but overcomplicated regulation, especially in the realm of accounting, only aggravates the situation. But can these seemingly irreconcilable objectives be fused into a harmonious system of regulation? This article works out a proposed plan by which it is suggested it can be done.

BY FRANCIS X. WELCH

HAPPY, says Seneca, is the nation without history. The inference is that history has a tendency to concentrate on unpleasant events, while more peaceful eras go more or less unrecorded. Utility regulation likewise has, perhaps, too much history or, at least, publicity for its own good. The average citizen casually reading about this court battle or hearing about that utility rate controversy cannot help getting the impression that utility regulation is one long, grand brawl with the utilities and the commissions aligned along opposite, hostile sides as inexorable as those of the fabled Kilkenny cats.

Even the law students and students of political economy, using the "case

EDITOR'S NOTE: Acknowledgment is made of the basic idea and text discussion of the subject matter of this article, which is to be found in a thesis submitted by Bernard S. Rodey, Jr., of New York city, as partial requirement for the degree of S.J.D. from New York University in 1938. Mr. Rodey's thesis was entitled "The Lay Meaning and Legal Significance of the Terms 'Original Cost,' 'Historical Cost,' 'Prudent Investment,' Including a New Plan to Settle a 50-year-old Problem."

system" (which rightfully enjoys such popularity these days in our universities), often emerge from their courses on public utility regulation with the idea that it consists more or less of a series of bitter fights over rates. They fail, for some reason or other, to realize that these very guiding cases give a distorted view of the relative amount of controversy that goes on in day-to-day commission regulation—that for every formal complaint registered, dozens and dozens of informal complaints are settled quietly—that for every formal opinion and order in a contested case, numerous complaints are adjusted otherwise—that for every court appeal, many, many commission orders are accepted peacefully if not cheerfully. In other words, the so-called "landmark case" that gets into the Supreme Court (and therefore into the headlines) is, in truth, only an occasional issue that raises its head for judicial inspection out of the ceaseless stream of routine regulation—and then chiefly for the purpose of providing some new and needed variation of guiding principle.

Yes, the regulation of the electric utility industry, now entering its fourth decade, has been a prolific source of publicized controversies. Yet, it must be admitted that the bad conditions brought about by public regulation are, like the news to Mark Twain of his death, greatly exaggerated. In the field of providing good service to customers, of eliminating discrimination favoring one group as against the others, of approving the soundness of security issues, commissions and companies have in the great majority of cases seen eye to eye and supervision has been achieved in a businesslike spirit of working together towards a common goal. In fact, instances are by no means rare where commission representatives have taken up the cudgels —in the interest of lower rates— against increased utility taxation.

VIEWED in this light, regulation is certainly not the failure it is so often decried to be; on the contrary it has proven highly successful. Perhaps the sole difficulty has been the determination of rates, coupled with the findings of fair value. And if we were to isolate this "trouble margin" we would probably find less than 5 per cent of the commissions' decisions have been litigated in the courts.

The reasons for the continual conflicts in this sphere of rate regulation are obvious, perhaps too obvious. The commissions feel the need for a larger say in how the utility books should be kept, while the companies complain about the increasingly burdensome and costly record keeping. Insistence by public authority on what figures are to be used to provide for annual depreciation, for example, is met with the cry of interference with internal management. Frequently rates claimed to be fair by the public body are denounced as confiscatory by the utilities' lawyers. Both sides see red at the mention of the huge costs of valuation proceedings. Basically the conflict runs like this: The commissions strive for the lowest possible rate, while the companies contend for the highest possible income.

Attempts have not been wanting to bridge the gap. The Washington Plan for a sliding scale of profit sharing between the utility and its customers is perhaps the foremost of these proposed

solutions, and the one most publicized. They all proceed on the principle that low rates are not only not incompatible with fair earnings, but are, in effect, indispensable. Why then have they not succeeded? Perhaps the answer may be found in the fact that the various plans sought to fix or freeze the rate base without *fixing the accounting methods and mechanics* by which it was to be established and perpetuated. They either assumed—erroneously—that accounting is an exact science or failed to consider it at all. Thus, in the Washington Plan the rate was fixed by contract.[1] It bore no direct relation to the unit actual cost of the various items constituting the property.[2] But these items were, of course, retired according to the book charge antedating the agreement. In other words, the rate base plan was divorced from the books of account on which the current day-by-day transactions must be predicated. The utility was in effect compelled by the plan to keep two sets of books: One for perpetuation of the rate base; the other to record changes on the basis of historical or actual cost.

[1] "The plan was embodied in a 'consent decree'. . . . Thus it partook of a contract made with the approval and given the imprimatur of a court." "A Regulatory Experiment That Worked Too Well," by Aaron Hardy Ulm, XI PUBLIC UTILITIES FORTNIGHTLY 390, 393, March 30, 1933.

[2] "How the 'Sliding Scale' Reduces Rates," by William A. Roberts, XVIII PUBLIC UTILITIES FORTNIGHTLY 13, July 2, 1936.

THIS separation of rate base plan and books of account had other unwelcome consequences. Depreciation was determined by a scale of percentages without regard to the size of the reserve. The utility would accrue on its books rather large sums to meet the cost of removing worn-out plant while actually it might have little money accumulated for that purpose.

Another feature which caused difficulty, according to the experience related in a definitive article by the former people's counsel of the District of Columbia, was the relative impossibility of auditing or examining the accounts of the utility in the short length of time between the end of the test year and the time when the new rates must be fixed. Then, also, errors were discovered in the accounting of the company after the rates had been fixed and there was no provision in the agreement to correct the injustice to either public or the utility as a result of these adjustments.

Yet the principle of the Washington Plan was undoubtedly right. It did away to a large degree with extended litigation; it did go a long way towards establishing a so-called "automatic" rate base; last, but not least, it provided an incentive for management to increase net operating earnings and thus to remain on the alert for opportunities to improve the service.

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¶ "... [*public utility*] *regulation is certainly not the failure it is so often decried to be; on the contrary it has proven highly successful. Perhaps the sole difficulty has been the determination of rates, coupled with the findings of fair value. And if we were to isolate this 'trouble margin' we would probably find less than 5 per cent of the commissions' decisions have been litigated in the courts.*"

It constitutes, perhaps, the only intelligent attack that has been actually made on regulation's most vulnerable point; namely, the penalizing of efficient management and the placing of a premium upon lazy management by the regulatory application of a fairly uniform, sometimes almost traditional, rate of return on all utilities, good, bad, and indifferent.

FURTHERMORE, the current trend has undoubtedly been toward quasi automatic, almost "fool proof" regulation. The Washington Plan, having fortuitously topped the most forbidding hurdle (by arriving at an agreed and relatively static rate base), approaches the problem through the rate of return, making that a sort of mechanical governor to keep the utility's rate economics functioning smoothly. In Wisconsin, where the old rate-base problem had to be solved (as in almost every other place), the "perpetual inventory" plan was devised. This, like the "continuous property records" system adopted by the New York commission, proceeds upon the assumption that in exact and detailed accounting there can be found a specific remedy for that age-old regulatory complication: rate-base-itis. From California come interesting reports of a sort of ounce-of-prevention idea in the form of "continuous investigation"—which seems to take the practical approach of anticipating utility rate complaints by the singular device of beating the complainants to the draw.

Now, it is apparent that notwithstanding the different avenues of approach, these plans all have a fairly common objective—to remove the uncertainty and controversy of regulation, to reduce regulation as much as possible to an exact science—a precise formula. It may be easy enough to pick flaws in any of these particular schemes, but it is only by constantly striving that specific remedies in various fields of human research have ever been discovered, whether in medicine, physics, and even in the "dismal science" of economics. Some day the formula for a regulatory "cure-all" may emerge. It is not beyond the realm of comprehension.

MEANTIME, however, some of this experimenting can become mighty expensive and burdensome. Take this continuous property record system in New York, for example. The theory may be sound enough. It may be possible to account for every unit of utility property in such detailed fashion, and subject a utility's fiscal life to such a constant goldfish-bowl type of regulatory scrutiny that, upon a given signal, all the factors can be merged and promptly turn up some kind of a total figure for this or for that—something like the automatic totalizing machines at the pari-mutuel race tracks. Pushed to an extreme, it is possible in this way to work out an accounting formula whereby the state commission could telephone a utility and ask, "What's your rate base as of 10 A.M. today"—and get an answer back in a few hours.

But common sense intrudes at this point and asks the blunt question of whether the game is worth the candle. What price accounting perfection, if the paper work materially increases the cost? After all, is it in the public interest for utilities to become enslaved by the adding machine at the expense

Public Utility Regulation

". . . the regulation of the electric utility industry, now entering its fourth decade, has been a prolific source of publicized controversies. Yet, it must be admitted that the bad conditions brought about by public regulation are, like the news to Mark Twain of his death, greatly exaggerated."

of its primary function—public service? Is there such a thing as accounting running wild?

These questions are a bit on the pessimistic side, but consider this:

The growth of continuing property records has been accompanied by a staggering increase in the cost of accounting. If the results were satisfactory in the long run, one might be inclined to overlook these expenditures. It has been estimated that for every dollar represented in utility plant almost one cent must be spent to establish and price an inventory thereof on the basis of original cost accounting principles.[3] This does not include the annual cost of maintaining the inventory which has been estimated at almost 40 cents per $1,000 of plant investment.[4] It is evident that utilities and perhaps, following their example, industrial organizations, too, are incurring huge expenditures in accounting overhead in striving for an illusive accuracy by the attempt of tracking the dollars in and out of innumerable investment accounts.

UTILITY accounting costs have enormously risen during our time. This is the more serious, since the true costs are not wholly reflected in the charges associated with accounting. Altogether, accounting costs have increased from approximately $2.70 per customer in 1909 to approximately $3.50 in 1937, an increase of 30 per cent. In terms of production costs of electricity, accounting costs have increased, in thirty years, some 250 per cent.

Much of this is due to incredible itemization in plant accounting. Following the "dollar follow the property" theory, hardly any material change can be made in the physical plant without a corresponding authorization and debits and credits to plant investment

[3] New York Public Service Commission, Fitzpatrick and Orton Report; Analysis of Testimony and Recommendations in Regard to Proposed System of Accounts, Nov. 16, 1933, page 8.

[4] In the matter of the Adoption of Uniform Systems of Accounts for Electric Corporations, Case No. 7832, Stenographer's Minutes, at page 112.

accounts. One might think that we have carried accounting for construction costs, inventory, retirements, and depreciation matters to a point where accounting seems to become an end in itself.

The "dollar follow the property" theory is predicated on the proposition that the net dollars in the plant investment accounts shall and must agree with the prescribed original cost (net) of the existing properties used and useful in the business at any given time. But has a dollar once spent and invested for plant and property thereafter any relationship to what happens to any of its innumerable segregations? Is it in any way tied in with the destinies of individual parts of the property? Isn't it something like trying to figure out the present value of a dinner one has already eaten by the original cost of the restaurant check? Common sense tells us that dollars thus expended, like the cost of a single beam built into a ship, lose their identity and become merged into a living, functional, consolidated value.

THE only sound basis of determining the value of an aggregate enterprise is its earning capacity. Even granted that accounting must deal largely in the field of cost and not of value, it does not follow that the portion of property investment costs to be included in operating expense must be deduced by what has happened or, more exactly, by what it is assumed will happen in the near future, to a motor generator, a switchboard, a section of mains, or a desk and chair. On the contrary, the removal or destruction of a particular part of the property may bring about enhanced economy in operations. Replacement of transmission and distribution lines by others of considerably less cost may result in increased earnings. But, under the present theory of accounting, a decrease of the investment account equal to the cost of the first lines would be required, even though the result of the change be not a loss at all but a real asset to the business. Perhaps the physical property theorists have missed a bet by not providing us with an "intangible unit of property."

Even the advocates of this theory admit that it cannot be carried to its logical conclusion. From a dollars and cents standpoint, the line of demarcation between items charged to current maintenance expenses and those characterized as capital replacement is quite arbitrary. Replacements of condenser tubes amounting to some $50,000 and of screws costing 30 cents the gross may be treated alike. They are not put in plant account at all. On the other hand, a modest radio or typewriter has to be checked in and out of plant account.

IT is easy to conceive that the mechanics of continuous debiting and crediting of innumerable "units" involve huge accounting labor and correspondingly the growth of continuing property records has been accompanied by a staggering increase in the cost of accounting. If the results were satisfactory in the long run, or if this method were the only practical expedient presently known for determining the rate base, one might be inclined to overlook these expenditures. But why not follow a natural theory predicated on the assumption that money invested is at least presumptively a satisfactory

means of determining a rate base? This would leave the door open to challenge obviously imprudent expenditures and to provide for extraordinary fluctuations in the value of the dollar. The only problem to concern management and regulatory commissions would then be a judgment determination of how much should be charged against any one year's income as an operating expense.

Aside from commercial accounting, including indexing, credit, and collection work, the utility's accounting cost dollar is at present spent mostly for plant accounting work. Now, by adopting a single practical plan, this item can be reduced by from 50 to 75 per cent.

To do this the plan starts out with an analysis of the property investment dollars, according to the present books of accounts. Because the preparation of the figures for minor items could be disregarded, it is not unlikely that a small group of auditors could determine the answer within a few months, even for a substantial property, and present it to a regulatory board [5] in sufficient detail for a pronouncement on what items should be excluded from the investment. It is important that such a procedure be limited to really controversial items.

PERSONS familiar with rate proceedings are aware of the somewhat paradoxical fact that, while these records are exceedingly detailed and lengthy, the issues contended for are usually very few and limited. Deeds and maps are introduced to establish the location of, and title to, every parcel of land owned by the company, although there is rarely any dispute about it. The same often applies to property used and useful, not infrequently to original cost, to large portions of the inventory and its pricing, to the classification of rates, and other factors. Yet they all must be presented in full at the hearings, to the expense of time, labor, and money of the company, the commission, and the city. If the decision is for any reason unsatisfactory and an appeal is prosecuted to the courts, much of this testimony often has to be repeated all over again.

Expenditures would be divided by the plan into four large classifications. They are determined on the general fundamental principles of accounting that have existed in most industrial concerns, and in general throughout commercial accounting activities where the accounting for costs of property

[5] For those who think the present state commission set-up is too far away for the immediate problem, it has been suggested that a board of arbitration could be selected to determine only disputed items. Such a board might be composed of representatives from (a) the community served; (b) the state commission; (c) the management; (d) employees; (e) the judiciary. Their purpose, of course, would be to arrive at an agreed rate base.

¶ "IT *has been estimated that for every dollar represented in utility plant, almost one cent must be spent to establish and price an inventory thereof on the basis of original cost accounting principles. This does not include the annual cost of maintaining the inventory which has been estimated at almost 40 cents per $1,000 of plant investment.*"

was concerned, and which have never been burdened heretofore with an over-theoretical scheme of cost accounting.

These classifications are:

(1) Routine maintenance;

(2) Nonrecurring maintenance for periodic renewals and replacements which do not fit into routine maintenance, but whose cost is large enough to require equalization from year to year;

(3) Plant reconstruction and alterations, covering extensive replacements of plant such as complete modernization projects;

(4) Plant additions.

THAT part of the "rate base" which is reflected by the property investment account should not be subdivided beyond the present primary public service commission property accounts. The proposed accounting plan is to function *simply* and therefore there should be no arrangement to break down the determination of the amounts set up and established for the reserve in classifications two and three. The charges against these reserves would be amply identified by use of work authorizations, identifying the costs chargeable to those accounts and cleared thereto. No attempt would be made to relate investment dollars to physical units of plant and property.

Depreciation is and has been the chronic headache of utility accounting and regulation. It has been compared to the fair sex. "You can't live with women, and you can't live without them." Likewise there is no getting away from depreciation, and yet there appears to be no accounting solution. The reason is that the "causes of property consumption are exceedingly variable, fluctuating and uneven in effect. Indeed, the events in the life histories of units of property, which may shorten or cut off service life, are as many and as varied as the conditions of operation that are met." In other words, it is impossible to estimate in advance, with any assurance of correctness, the time any particular item will remain useful.

The plan proposed would recognize a practical concept of depreciation and avoids fanciful mathematical theories in respect to its determination. It realizes that prudent business procedure makes it necessary to establish a fair annual rate for the amortization of investment, which, in effect, leads to an estimate of the probable useful life of an entire plant. (That is, if the plant is static. If not static, the actual disbursements against these reserves would automatically increase the net investment in plant.)

TWO reserves would be provided by the plan to take care of depreciation costs, better described as expenditures under the plan (that is, exclusive of property expenditures annually chargeable directly as routine maintenance or as additional investment in plant). The first reserve is intended to cover minor nonrecurring repairs and replacements and may perhaps be labeled *Reserve for Nonrecurring Maintenance.* It contemplates those items which, although nonrecurring as far as annual operations are concerned, do recur with such frequency, say every five years, that the purpose of the reserve is largely to equalize the cost thereof from year to year.

In establishing it, consideration will be given to the actual expenditures of the particular utility as indicated by

Utility Accounting Costs

"UTILITY accounting costs have enormously risen during our time. This is the more serious, since the true costs are not wholly reflected in the charges associated with accounting. Altogether, accounting costs have increased from approximately $2.70 per customer in 1909 to approximately $3.50 in 1937, an increase of 30 per cent. In terms of production costs of electricity, accounting costs have increased, in thirty years, some 250 per cent."

past experience. Assuming, in general, that this item has in the past amounted to approximately 0.6 per cent [6] of the investment in electric plant per year, such a percentage would be initially used in determining the annual accrual. Thereafter, at periodic intervals, the amounts appropriated to this reserve would be adjudicated on the basis of whether this fund was successfully serving its purpose in equalizing the annual charges against operating expenses. There would be no need to determine this application by the detail characteristics or items of the property or their ages as for this purpose it could be arrived at more accurately on an overall basis.

The other reserve taking care of expenditures on account of depreciation might have for its title *Reserve for Plant Reconstruction and Alterations.* It should be applied to major renewals and extensive replacements of plant. This would include such items as complete modernization projects involving the substitution of more modern and efficient machinery in place of that which has become obsolete or inadequate due to development of the art.

This reserve, too, would be set up by the board of arbitration. Its size should be determined largely on the basis of judgment and information, fortified by views of people having knowledge of the actual operations of the property. The annual appropriation out of earnings might properly amount to between 2 and 3 per cent of the agreed rate base.

AN important feature of the plan is that under this type of accounting process, there would be no need of effecting any direct retirements (subtractions) from the rate base because the reserves established would auto-

[6] Figures used in this outline of the plan, although approximately correct, are used for purposes of illustration only.

matically act in so far as the balances therein indicated that they had not been used, as a reduction of the rate base. Likewise, if amounts have been expended to replace property, the reserve charged therewith would be diminished to that extent and the rate base would be automatically increased. Should on any occasion the actual charges exceed the reserve for major replacements, which had been established for that purpose (which ordinarily would not be the case), then that excess, unless absorbed in the following year, should be treated as a temporary increase in the rate base.

No plan can at present be generally successful, or acceptable, that does not consider tax simplification. By making the Federal, state, and municipal taxing authorities partners in the net earnings —which for all practical purposes they are already at present—the plan would provide for an automatically controlled tax liability and a simplification of the periodic determination of the taxes to which utilities are now generally subjected. It would to a large degree do away with the seemingly unlimited practice of using the utility as a tax collector.[7] It would also release vast funds, now used for tax accounting in its many branches, for more productive purposes.

To insure stability, the agreement regarding the rate base and the annual rates of accruals to the reserves should run for at least five years, with either party privileged to renew it at 5-year intervals up to twenty years. A sliding rate of return (à la Washington Plan) would divide the profits above a basic rate of return among the utility, the employees (not officers), and the customers. This inclusion of labor in the profit sharing is important. It not only gives the employee the incentive and responsibility of quasi partnership in the enterprise, but also silences the criticism which might be made of the orthodox Washington Plan that it tends to stimulate managerial efficiency at the expense of labor. As in the amended Washington Plan, provision would also be made for a "ceiling" or upper limit on profits and the excess income applied towards general reduction in rates. The Washington experience has shown such a maximum limitation to be a practical, if not political, necessity.

It is estimated that if the above plan were accepted, together with the partnership feature in lieu of all other forms of taxation, it would result in an almost unprecedented savings.

A CONSERVATIVE estimate of the savings under this plan on a national basis for the electric industry might be placed very roughly at $125,000,000 to $150,000,000 a year. The intangible benefits would be as follows:

(a) Settling of arguments and elimination of politics concerning utility rates, a problem that is now over forty years old.

(b) Restoration of a sound investment field for capital at a fair return without fear of confiscation.

(c) Better employee relationships and more constructive work for labor because of the making of needed plant modernizations and renewals.

(d) Better relations between the utilities and the governments.

[7] This is really not so revolutionary as it sounds. Already utilities are in some places taxed on a percentage of gross revenues in lieu of other forms of taxes. The above proposal would, in the interest of common equity, shift the percentage tax base from gross revenue to net revenue.

The SEC Prepares to Make Little Ones Out of Big Ones

The story of an informal talk with Chairman Jerome N. Frank of the SEC on those pressing questions of integration and diversification in the administration of §11 of the Holding Company Act.

By HERBERT COREY

THE telephone rang. Chairman Jerome N. Frank of the SEC replied to the complaining witness that he had not forgotten the lawn party. He proposed to go to the lawn party. He might be able to get away in ten minutes—this with a glance at the reporter who had been patiently waiting—but it must be understood that he had to go and dress. No one, said Mr. Frank to the complainant, would wish to go to a lawn party in his present state. He was very glad she had called up.

"You do not understand," said Mr. Frank to the reporter.

One thing at a time. A consideration of Mr. Frank shall precede Mr. Frank's consideration of the understanding of the reporter. He wore a rumpled white shirt which had been tucked inside his belt many times during the official day and had always fought itself free. He wore loose, light-colored, thin pants. The word pants is used in preference to the slightly sissy slacks with creases running from the waist line which have been ravaging the hot weather population. His shoes were of the soft-soled tennis variety, and he had been pacing in and out of the room in a manner reminiscent of a tennis player temporarily out of rackets. His hair is loosish and light, his eyes blue, he wriggles, his nose is formidable, he chain-smokes, and he is a virtuoso on the documentary evidence to back up his statements and the secretarial push-buttons. He is voluble, eager—the reporter would like to maintain that he was journalistically impartial but the fact is he went giddy—and likable.

"This is the way it is," said Chairman Frank.

THE reporter afterward checked up with other people, other reporters, bankers, utility men, investment bankers, and underwriters, and so on

and found that his experience ran true to a pattern. Some of them admit that they come away vaguely feeling that there is something wrong somewhere with the picture but that Frank is all right. They wish to deprecate his ideas but after a talk with the SEC chairman they find it difficult to move in with the deprecation. He listens patiently but when his turn comes he rebuts in a torrent. There used to be a magician named Melini who had a way of borrowing a marked dollar bill from one man and a cigarette out of a fresh pack from another and then pick the dollar bill out of the cigarette with the point of a knife. For years this reporter has wondered if there was not something he missed when he saw this done.

"Senator Taft said recently that the whole matter of the SEC should be reëxamined. Do you agree?" asked the reporter.

"No. The law is all right. Everyone agrees that something had to be done about the unsound practices which had grown up during the twenties. Congress gave the proposed legislation long and careful consideration before it was enacted. The commission has examined literally thousands of cases and no doubt it has made mistakes. But the basic philosophy has never changed. We try to protect the interests of the private investor, especially when there is a conflict between the holding company and the minority interest. The law is clear. We did not write it. Our job is only to enforce it."

THERE have been complaints by the utilities. The law directed that holding companies should "integrate" their holdings (§ 11 (b) (1)). The holding companies have been protesting that the SEC has not laid down a hard and fast rule for them to follow. If a holding company does not know how it must integrate, wherewith shall it be integrated? Then, the holding companies say, after keeping them in the air for years the SEC suddenly broke down in the UGI case and agreed to make the initial move and propose a plan for UGI integration. Nine cases have been started under this "death sentence" clause, all of which might have been avoided if the SEC had been willing to oblige sooner.

But it appears that the SEC's capitulation in the UGI case has been misunderstood. The law does not give the SEC authority to make a blanket ruling in advance. That way it might get into trouble. What actually happened was that counsel for the UGI asked that the SEC outline what it thought the UGI integration should be. The SEC did not propose to be caught off base but it was willing to meet the UGI halfway. It was agreed that the staff—not the commission—should give its thought on what the UGI integration should be. Obviously that thought would be ok'd by the commission but it would not be an action by the commission. If the UGI found the plan acceptable it would no doubt accept it. In that event the commission would no doubt approve. But the commission does not propose as a rule of action to make over any holding company's map.

The reporter observed that this matter of integration is a very hot potato indeed. That is the way that Chairman Frank talks. The reporter had no fear that he would be misunderstood. It was not so long ago that everyone was cheering for diversity as offering an

element of safety. The operating company in the Dust Bowl might go deeply in the red, but the other operating companies, of which control was held by the holding company in the manufacturing districts and the mining country, would save the promised dividends.

IT is the law, said Mr. Frank. The business of the commission is to enforce the law. The SEC has, of course, a certain discretion, and it would not take action which might unnecessarily impair the value of a holding company's stock. If that stock did not have solid value behind it, that would be just too bad. It was suggested that the law is an element in the New Deal's apparent desire to promote Federal centralization and to lessen the political power of the communities. Carrying forward the illustration used in the preceding paragraph, the reporter observed that a holding company whose interests were diversified could support the injured operating company in the Dust Bowl. But if the holding company had been disintegrated, the Dust Bowl unfortunates could only appeal for aid to the Federal government. It could get none at home. Hence—centralization.

"I think it works just the other way. It localizes interest."

He went to the banking business for an illustration of his point. A big company wishing to put out a large issue of bonds finds the way smoothed. The big banking interests know all about it. The local banker takes what he can afford and passes the rest on to one of the money centers of the East and the bond issue is floated at very small cost. But if a comparatively small local company wishes to issue somewhere between $100,000 and a million in bonds, it finds the cost is exorbitant.

"In common stock issues sometimes up to 20 per cent."

No criticism of bankers is involved there. It is merely that the local banking facilities are unequal to the job of investigating and marketing the small issue of bonds. Therefore he has been urging the creation of regional banks, for the prime purpose of furnishing expansion funds and handling the bond issues of the local business organizations. He would have the government buy the nonvoting preferred stock, sell the common to local investors, and make the bank pay. It might get a sour issue now and then, but business men who know their community would not often miss.

"THAT is not urging more government in business. If I felt that plan could not be worked out without keeping government out of the

¶ "BONDHOLDERS *have not suffered in earnings protection, for fixed charge coverage before depreciation is at approximately the 1929 level. They are afforded better protection, in fact, because of the increased depreciation charges. The requirement that utility companies shall show the original cost of their properties on their balance sheets has brought to light write-ups and excessive valuations not previously evident.*"

control—and without the assurance that under no circumstances could the government take over any business which the bank could have aided—I would be against it myself. I am against more government in business just as much as you are. I want to stress the importance of regionalization. Local needs are best known to those in the locality. You might sell stock to New York in a giant market for Bungville, but Bungville wouldn't buy. Bungville would know that a giant market would not pay."

The reporter said a good deal of criticism had been directed toward the SEC's apparent practice of making fish out of one company in need of financing and a fat capon of another. Some companies were permitted to sell common stock. Some could not issue bonds. No one could tell which or when. In the matter of the Consumers Power Company, for instance, in which Cyrus Eaton of Cleveland had coaxed U. S. Senator George W. Norris to issue a decree. The time set for Mr. Frank's possible arrival at the lawn party was automatically moved up ten minutes. The Consumers Power Company is wholly owned by the Commonwealth & Southern, does a $40,000,000 annual business in a thoroughly integrated district of 2,000,000 population, and has a high-grade credit standing. It asked permission to issue and sell, in round figures, $28,000,000 in bonds and 125,000 shares of common at $28.50 a share.

The Michigan PUC had approved. Then the SEC gummed the cards. Would Chairman Frank make a statement? He would, gladly. Plenty of muzzle velocity.

"THE commission ok'd the issue of $18,000,000 in bonds because that was a refunding operation by which the Consumers Power Company saved one-half of one per cent annually. That was fine. We would never interfere with a refunding operation of that nature when debt ratios are not dangerously high or other conditions do not transverse the standards of the act. Be silly if we did.

"We did not object to the sale of common stock. The commission as a whole and I personally favor the issuance of more equity money. It would be improper for such a company as the Consumers not to take advantage of a favorable opportunity to sell common stock. We do not know what may happen in the future. No one ever did know—broadly speaking. It used to look like good business for the railroads to sell bonds so that with the money they could make big profits for their stockholders. You know now what happened to the roads. If the utilities—all industries—preserve their bond-selling credit by raising money now by the sale of common stock they will be in a safer position.

"The commission objected to the issue of $10,000,000 bonds by the Consumers Company because it had been demonstrated that it could get the needed money by the sale of common stock. It was not in the public interest to permit the company to increase its funded debt."

The reporter observed that he had been led to believe that the commission has an aversion to common stock. Prominent representatives of the New Deal—the names can be drawn out of any hat—have publicly abominated common stock in the tones of a hydro-

Issue of Bonds

"A BIG company wishing to put out a large issue of bonds finds the way smoothed. The big banking interests know all about it. The local banker takes what he can afford and passes the rest on to one of the money centers of the East and the bond issue is floated at very small cost. But if a comparatively small local company wishes to issue somewhere between $100,000 and a million in bonds, it finds the cost is exorbitant."

phobic dog approaching running water. Common stock is one of the most unpleasant charges brought by these gentlemen against industrialists who have made good. The reporter was shocked to discover the chairman of the SEC openly admitting the virtues of common stock. Mr. Frank conceded that the reporter had been shocked and passed on.

THE SEC, he said in effect, is not disposed to let utilities or other lines of industry run hogwild in the issuance of common stock. The commission was compelled to keep its weather eye lifting. He objected to the labeling of this guardianship as "political persecution." The commission did not regard "bigness" necessarily as a fault. Nor as a guaranty of soundness. Bondholders have not suffered in earnings protection, for fixed charge coverage before depreciation is at approximately the 1929 level. They are afforded better protection, in fact, because of the increased depreciation charges. The requirement that utility companies shall show the original cost of their properties on their balance sheets has brought to light write-ups and excessive valuations not previously evident. In turn this has resulted in reductions of the mortgaged debts and the setting up of sinking funds.

The reporter observed that a utility which was forced to disintegrate in a hurry under the provisions of the Holding Company Act was practically certain to lose money. It would encounter a buyers' market in which the buyers would have their backs turned. Chairman Frank said that no utility was being forced to disintegrate in a hurry. They have been given all the time they need. If they do not like the final ruling of the SEC they can go to court. If the SEC had not given them all the protection possible the court would oblige. In the end it will be found that holding company securities will be appraised on their true earning power, and should command a price based on investment values rather than on the speculative opportunities they offer.

"GOVERNMENT regulation will not hurt any sound company. Some one had to regulate American business. It would not regulate itself. Business leaders will agree to that proposition."

THE reporter was disposed to find fault with the quality of discretion afforded the SEC under the act. It seemed to him to be in a position to do about what it pleased. It was that wide latitude given to the minor controllers of the government that had occasioned the outcries resulting in the introduction in Congress of the Walter-Logan bill. Chairman Frank explained that the SEC did not have discretion to go sovereign on its own account. Congress had charted a course and the SEC was given discretion to avoid the rocks and sand bars on it.

"That was the understanding when the act was passed. That was fully understood. Congress could not write into the law provisions to meet every possible and unanticipated contingency. The Investment Bankers Association fully recognized this."

The telephone took on a plaintive tone. Chairman Frank told it that he was practically on his way to the lawn party. Only a few minutes more.

The chairman observed that there are people who think that the delegation of discretion to the SEC is obnoxious to the Stock Exchange and the financial community. But if the reporter looked up the history of the act he would find that it was the leaders of the Exchange and the financial community who urged Congress to give the commission power to deal with the complicated problems involved. It was by common agreement that Congress wrote the objectives into the law and left the mechanics of enforcement to the commission. The commission, he thought, has been understanding and patient. It has not been crusading. Anyone who wants to know what the commission will do need only read the act. It prohibits pools and manipulations, calls for the disclosure of full information on corporate securities, regulates the use of credit in the financing of security transactions, directs the commission to see to it that brokers do not conduct themselves in such a way that their interests conflict with the interests of their customers, and to protect investors against practically avoidable risk of loss through insolvency or dishonesty on the part of brokers.

"FOR example. Not one customer in a thousand knows that if he owes nothing to a broker, but leaves cash with the broker, he is by no means certain of getting back his cash if the broker becomes insolvent. Brokers commingle the customers' funds with the funds of the firm and use them as their needs require. In fact the brokers are doing a banking business but are neither regulated nor inspected by Federal or state officials. There is practically no protective governmental supervision of the hundreds of millions of dollars deposited with them. It is true that the Exchange supervision of its members has done much to reduce risks, but the attempt to assure complete protection through such supervision imposes a terrific burden on a private association. A long time ago we learned that we could not depend on banks to regulate themselves. If brokers are to continue to act as bankers they too must be supervised by the government for the protection of the public."

"It is up to the Street," he said. "The problem simply boils down to this. Which does the Street prefer? More of the SEC in this field, or none

at all? Complicated SEC regulations or none whatever? If the Street will make the customers safe through its own act it can get rid of the SEC in this field. If it will not then the SEC must move in. We prefer that the Street look after this itself. That course would be simpler, less expensive, less irritating to both sides. This is one area in which getting rid of the government is exquisitely simple. If the Street only will, the commission will be delighted."

THE conversation returned to holding companies and their problems. Mr. Frank touched off some buttons. The secretary brought a copy of the act.

"The congressional mandate," he said, "was to bring about compact geographical units not so large as to impair the advantages of localized management, efficient operation, and the effectiveness of regulation. A holding company may retain independent systems if it can be shown that divorce would cost substantial economies, provided that such additional systems are located in a single state, or in adjoining states, or in a contiguous foreign country."

It is the duty of the SEC to enforce the act, at and within its discretion. Holding companies which do not come within its provisions must comply or liquidate. It has been shown recently that common stocks of sound operating companies are in demand. As a holding company sells its operating securities it must retire its own securities. This amounts in practice to a refunding operation, so that the net effect will be to replace holding company securities with sound operating company securities. This should relieve the market of the burden of suspected holding company securities, and improve the credit position of local and regional operating companies, according to Mr. Frank. There are various methods by which the exchange of stocks and properties might be accomplished. The commission has the authority to approve any fair and equitable plan. There is no reason why stockholders should suffer losses because their true equities in the assets and earnings of operating companies will be preserved.

ONE plan, the chairman observed, would be to divest the holding company of its power of control. That would leave it in the position of an investment trust. He had no fear that the operating companies would in the end suffer from any loss of servicing benefits. Large operating companies do get along without outside servicing, as has been sufficiently shown. There is no reason why small companies might not form independent associations for their mutual benefit. The act is sufficiently flexible to permit cautious experimentation.

¶ "IT *has been shown recently that common stocks of sound operating companies are in demand. As a holding company sells its operating securities it must retire its own securities. This amounts in practice to a refunding operation, so that the net effect will be to replace holding company securities with sound operating company securities.*"

"The industry should be able to expand under private ownership to meet new demands and withstand possible future economic strains. In that way it would be able to avoid the condition in which the railroad business finds itself today."

There were other questions the reporter wished to ask. There had been talk, for instance, of taking from the holder of common stock his right to vote, and turn that over to the holders of the senior securities. Would that be ethical? One thing the holder of common stock bought was that same right to vote. Has he the right to divest himself of it? It is the understanding of the reporter that Mr. Frank's position is that the stockholder has both the right and the privilege. Or he can exert another right and privilege and refuse to do any such thing, in which case the SEC has the authority to go into action.

The reporter observed that buyers of holding company stocks thought they were purchasing security through the diversification of the company's holdings in other companies.

Mr. Frank called attention to the hitherto quoted provisions of the act.

THE reporter asked if the holders of senior securities are equipped to assume managerial functions. The chairman did not see why they should not be. Their stake in the enterprise is usually three times that of the holding company. They had not been taking part in management because they had no opportunity. He thought the human nature of a bondholder did not differ markedly from the human nature of a stockholder. He did not believe that the average holder of common stock bought that stock with the idea that he would take any active part in the management of the company. The chairman thought that holding companies would not suffer unfairly from their loss of control. Directors are trustees for all security holders. Once the holding company influence is removed the influence of the local management will be increased. Substantial investors, he thought, would welcome the opportunity of again managing their own properties. The lawn party telephone rang. The chairman shook hands. On his way out the reporter apologized to the secretary for the part he played in running up her overtime.

"I'm used to it," said the secretary.

The True Cost of Waterway Transportation

"IN attempting to determine the real value of any component of the national transportation system we must estimate the *true cost*—that is, not only the investment by the carrier itself but public expenditures as well. In water transportation, for example, especially on canalized rivers, this is a prominent consideration. Much of the tonnage now moving on improved inland waterways could be expeditiously moved by rail at a lower cost if the shipper were required to pay, in addition to the direct cost, the so-called 'hidden cost' assumed by the government. Water carriers have received continued subsidies from the government. Nearly all inland waterways must be improved and maintained at heavy public expense. Lower rates made possible by such public aid throw competitive costs off balance."

—EMIL SCHRAM,
Chairman, Reconstruction Finance Corporation.

SEC Limits State Jurisdiction

Administrative interpretation of Holding Company Act by SEC may deprive state commissions of effective jurisdiction over security issues of local utilities.

By ASEL R. COLBERT

CHIEF, ACCOUNTS AND FINANCE DEPARTMENT, WISCONSIN PUBLIC SERVICE COMMISSION

ASSUMPTION of power by the Securities and Exchange Commission continues. And if the tendency is not stayed state commissions will have little real authority over security issues of local utilities.

It is granted that the SEC has broad jurisdiction over security matters of registered holding companies. Now it appears that there is grave danger that by administrative interpretation this broad jurisdiction may be extended to the securities of subsidiary operating utilities even where such utilities come squarely under the exemptions provided in § 6(b) of the Public Utility Act.

If this happens, it will mean that by the exercise of powers implied by the commission administering the act, regulation of security issues by the states will be nullified and state commissions reduced to administrative rubber stamps for such action as the Federal commission may approve. State commissions should awaken to this danger to state rights if not already aware of it.

A STATE commission clothed with adequate statutory powers, reasonably financed and properly staffed, exercises broad jurisdiction over the operations of local utilities. This is particularly true with respect to the Wisconsin commission. It has intimate knowledge of local conditions affecting a utility; it knows the utility's credit and prospects; it prescribes the system of accounting to be followed; it determines the depreciation rates and methods to be used; it has statutory power to prevent impairment of capital through improper payment of dividends on common stock; it has jurisdiction over transactions with affiliated interests; it has authority to inquire into the management of utilities; it has jurisdiction concerning improper delegation or relinquishing by directors of their duty to manage and direct the affairs of utilities; it prescribes service rules and regulations; and it fixes just and reasonable rates for utility service.

State regulation of these matters vitally affects the operations, earnings, and financial condition of the local utili-

ties. A state commission with these statutory duties and powers and properly staffed is better able than the Securities and Exchange Commission to pass on the reasonableness of security issues of local operating utilities.

The refinancing of preferred stock by Wisconsin Electric Power Company, Milwaukee, affords an example of how the Securities and Exchange Commission may use its powers to thwart state regulation and impose its wishes on the public utility and the state commission. A history of this case will be enlightening as an indication of the consideration that may be given the determinations of state commissions.

WISCONSIN Electric Power Company, an electric utility operating in Milwaukee and adjacent territory wholly within Wisconsin, filed an application with the Wisconsin commission on February 20, 1940, to issue securities for the purpose of retiring outstanding 6 per cent preferred stock, issue of 1921. The refinancing plan proposed the issuance of $28,209,800 of 4½ per cent preferred stock and a maximum of $2,820,980 of common stock to accomplish the retirement of $28,209,800 of 6 per cent preferred stock.

The new preferred stock was to be convertible into common stock at the option of the holder until June 1, 1952, on the basis of 1 share of $100 par 4½ per cent preferred stock for 5 shares of $20 par value common stock.

The outstanding 6 per cent preferred stock ($7,871,000) was held by The North American Company (parent company of Wisconsin Electric Power Company through common stock ownership) with $20,338,800 par value being owned by the public.

The plan of financing contemplated that an offer would be made to 6 per cent preferred stockholders whereby at their option they might deposit their stock for exchange and receive one share of new 4½ per cent convertible preferred and one-half share of $20 par value common stock for each share of 6 per cent preferred stock deposited. The plan was conditioned upon acceptance of the exchange offer by holders of 60 per cent of the stock in the hands of the public, in which event The North American Company would deposit its shares for exchange on the same basis. The new 4½ per cent preferred stock not used in the exchange offering was proposed to be sold to the public at $104 per share for cash to secure funds for the redemption of 6 per cent preferred stock not deposited for exchange. In accordance with this plan, a minimum amount of $20,074,300 of 6 per cent preferred stock would be deposited for exchange and a maximum of $8,135,500 of new 4½ per cent preferred stock sold to underwriters.

THE financial structure of Wisconsin Electric Power Company upon completion of the proposed refinancing based upon minimum acceptance of the exchange offering would have been as shown in Table I.

The Wisconsin commission considered the plan of refinancing and on March 25, 1940, approved it as meeting the requirements of Wisconsin statutes and granted a certificate of authority to issue the 4½ per cent preferred stock and common stock to accomplish the refunding of the 6 per cent preferred stock. The authority granted by the commission in security cases is permissive, however, and the company

did not pay the statutory fee and accept the security authorization.

The reason for not accepting the security authorization was soon apparent. On April 6, 1940, the company filed a supplemental application for authority to issue securities in which it stated that "Due to the requirements of the public utilities division of the Securities and Exchange Commission the proposed plan of refinancing the applicant's outstanding 6 per cent preferred stock, issue of 1921, has been somewhat revised." The supplemental application requested authority to issue (a) $26,209,800 of 4¾ per cent preferred stock (nonconvertible) and $3,820,980 of $10 par common stock for the purpose of retiring $28,209,800 of 6 per cent preferred stock, and (b) $10,500,000 of $10 par common stock in lieu of $21,000,000 of $20 par common stock outstanding.

THE revised plan provided for the offer to existing 6 per cent preferred stockholders of an opportunity to exchange their stock for one share of new 4¾ per cent preferred and one share of $10 par common stock for each share of 6 per cent preferred stock. The offer was conditioned upon the acceptance thereof by holders of at least 60 per cent of the preferred stock held by the public in which event The North American Company would deposit $5,871,000 par value of 6 per cent preferred stock held by it for exchange on the same basis and would exchange $2,000,000 additional par value of 6 per cent preferred stock for $1,200,000 of $10 par common stock. Shares of the new 4¾ per cent preferred stock not required in the exchange offering were to be sold to the public at par to obtain funds to redeem the 6 per cent preferred stock not deposited for exchange.

Upon completion of the refunding operation under the revised plan, and based upon the minimum acceptance of the exchange offering, the capital structure of the company would have been as shown in Table II (p. 152).

The Wisconsin commission granted authority to issue the securities under the revised plan on April 15, 1940. In its certificate of authority the commission said:

> We have no hesitancy in saying we believe the original proposal was much the better calculated to serve the public interest. However, since the company has chosen to modify its plan so as to meet objections raised by the Securities and Exchange Commission, we have no alternative but to con-

TABLE I

	Amount	*Per Cent of Total*
First mortgage bonds, 3½ per cent, due 1968..	$55,000,000	44.1%
Unsecured promissory notes, 2⅜ per cent, due serially to 1948	13,250,000	10.6
Total bonds and notes	$68,250,000	54.7
Preferred stock, 6 per cent, 1897 series non-callable	4,500,000	3.6
Preferred stock, 4¾ per cent convertible	28,209,800	22.6
Common stock, $20 par per share	23,007,430	18.5
Earned surplus	741,377	.6
Total	$124,708,607	100.0%

sider whether the amended application meets the requirements of Wisconsin statutes.

The primary difference between the original and the revised plan was the elimination of the right of conversion of the new preferred stock into common stock. Other changes, such as the reduction in par value of common stock from $20 to $10 per share, and the raising of the preferred stock dividend rate from 4½ per cent to 4¾ per cent, were attributable to the elimination of this conversion privilege.

THE specific grounds for the objections of the public utilities division of the SEC to the convertible feature of the preferred stock have not been stated publicly. The opinion and order of SEC granting exemption under § 6(b) to the securities issued under the revised plan refer to the original application in a footnote, but no discussion of the original financing plan is presented. Information was received, however, that indicated the probability that the objections were premised upon the following:

(a) The investor would pay too much for the conversion privilege;
(b) The conversion period was too long;
(c) Convertible preferred stocks are not desirable and are not favored;
(d) The conversion privilege might interfere with integration proceedings under § 11.

Let us analyze these objections.

Under Wisconsin statutes conversion rights may be given to preferred stock and become only one of the characteristics of the stock and are not separable from the stock itself. Hence the price the investor was to pay for the conversion privilege in this instance is not capable of precise measurement.

The right to convert preferred stock into common stock, although similar, is not the same as an option to buy common stock. An option to buy common stock at a price higher than current value involves the risk of present investment without return in the hope that a profit may be made later through an increase in value of the stock over the option price. Such an investment depends for its worth upon future prospects and is speculative in nature.

TABLE II

	Amount	*Per Cent of Total*
First mortgage bonds, 3¼ per cent, due 1968	$55,000,000	44.1%
Unsecured promissory notes, 2⅝ per cent, due serially to 1948	13,250,000	10.6
Total bonds and notes	$68,250,000	54.7
Preferred stock, 6 per cent, 1897 series non-callable	4,500,000	3.6
Preferred stock, 4¾ per cent series	26,209,800	21.0
Common stock, $10 par per share	13,507,430	10.8
Paid-in surplus created through reduction in par value of common stock from $20 to $10 per share plus credit on exchange of 120,000 shares common stock for 20,000 shares preferred stock, a total of $11,300,000, less call premiums and other items charged to paid-in surplus	8,478,032	6.8
Earned surplus	3,775,891	3.1
Total	$124,721,153	100.0%

Worth of Option to Buy Stock

"THE worth of an option to buy common stock at a specified price is dependent largely on the prospective earnings applicable to the common stock. If those earnings are or become sufficient during the option period to support the option price plus the cost of the option and return thereon, the investment in the option is justified."

THE purchase of preferred stock convertible into common stock involves a present investment with a return and the possibility of later increase in return, and appreciation of principal through increase in the value of common stock over the option price. It combines a speculative flavor with an investment security. And, where the return on the preferred stock is low and the future prospects of the business good, that speculative flavor enhances the investment status of the preferred stock because it operates to reduce the risk of loss in value of principal.

For the purpose of this discussion, however, the convertible characteristic of the preferred stock will be considered as equivalent to the sale of an option to buy common stock and an attempt made to measure the approximate offering price of such option, and to show that even when so considered the convertible preferred stock was justified.

The 4½ per cent convertible preferred stock was proposed to sell to the public at $104 per share and the 4¾ per cent nonconvertible preferred stock at $100 per share. On a straight arithmetical basis this would indicate that the 4½ per cent preferred stock without the conversion privilege would have a market value of about $95 a share, if sold on a 4¾ per cent basis, indicating a value of about $9 for the conversion privilege.

HOWEVER, market values of securities do not vary directly in proportion to the difference in dividend rates and it is unlikely that the conversion privilege was given a weight of $9 in the proposed offering of the 4½ per cent preferred stock at $104 a share. Estimates were made that from $4 to $6 was attributable to the conversion privilege. For the purpose of this discussion, a price of $5 will be assigned to it. Since each share of the convertible preferred stock could be converted into 5 shares of common stock, this is

equal to $1 for each share of $20 par value common stock into which the 4½ per cent preferred stock could be converted.

The worth of an option to buy common stock at a specified price is dependent largely on the prospective earnings applicable to the common stock. If those earnings are or become sufficient during the option period to support the option price plus the cost of the option and return thereon, the investment in the option is justified.

Let us consider the common stock earnings of Wisconsin Electric Power Company. In 1939 the net income of the company after interest was $3,952,015. Assuming no change in this amount, except as occasioned by reduction in interest and amortization of debt discount and expense as serial notes are paid (less increase in income taxes due to less interest deductions), the net earnings on stock would be as shown in Table III.

IF the convertible preferred stock had been issued, there would have been 282,098 shares of such stock outstanding and a maximum of 1,191,049 shares of $20 par common stock. If all the preferred stock were then converted into common stock, there would be a maximum of 2,601,539 shares of common stock outstanding. On this stock the estimated earnings and the income available for dividends, after provision for contingent losses on transportation investment, would have been as follows:

Year	*Earnings per Share of Common Stock**	*Income Available for Dividends per Share of Common Stock**
1940	$1.46	$ .98
1941	1.48	1.00
1942	1.49	1.01
1943	1.51	1.03
1944	1.53	1.05
1945	1.55	1.07
1946	1.56	1.08
1947	1.58	1.10
1948	1.60	1.24
1949	1.62	1.62

* On 2,601,539 shares of $20 par per share, assuming all 4½ per cent preferred converted into common.

On the basis of common stock of $20 par value per share it is seen that estimated earnings during the 10-year period would range from 7.3 per cent to 8.1 per cent and that income available for dividends, after the special ap-

TABLE III

Year	*Estimated Net Income*	*Less Dividends on 6% Preferred*	*Balance Earnings on Convertible Preferred and Common*	*Less Appropriations for Contingent Losses on Transportation Investment*	*Balance Available for Dividends on Convertible Preferred and Common*
1940	$4,071,513	$267,048	$3,804,465	$1,250,000	$2,554,465
1941	4,106,561	267,048	3,839,513	1,250,000	2,589,513
1942	4,148,193	267,048	3,881,145	1,250,000	2,631,145
1943	4,191,037	267,048	3,923,989	1,250,000	2,673,989
1944	4,239,492	267,048	3,972,444	1,250,000	2,722,444
1945	4,287,947	267,048	4,020,899	1,250,000	2,770,899
1946	4,336,401	267,048	4,069,353	1,250,000	2,819,353
1947	4,386,067	267,048	4,119,019	1,250,000	2,869,019
1948	4,441,343	267,048	4,174,295	950,000	3,224,295
1949	4,488,390	267,048	4,221,342	.....	4,221,342

propriation to reserve for contingent losses on transportation investment, would range from 4.9 per cent to 8.1 per cent. These figures are based on complete conversion of the preferred stock and, therefore, reflect the lowest per share earnings on common stock.

FURTHERMORE, the estimates of earnings assume no improvement in operating income over 1939, which is believed to be conservative considering the present outlook. It is to be noted also that no increase in income is included arising from the investment of appropriations of income to the reserve for contingent loss on transportation investments. The funds retained in the business for this purpose will not be permitted to lie idle. Presumably they will be invested in utility property. By the end of 1948 there would be a total of $10,900,000 of such investment on which, ignoring any compounding of earnings, a return of $500,000 to $600,000 might reasonably be expected.

Furthermore, savings in interest costs do not stop in 1949. When the present serial notes are retired, the sinking-fund provision of the bond indenture becomes effective. This requires retirement of 1½ per cent of the $55,000,000 of bonds each year, thereby increasing common stock earnings by reason of the interest saving on retired bonds.

Considering the picture as a whole, the price attributable to the conversion privilege appears justified. And, if any further proof be necessary, *a local market with knowledge of the company's history and practices and informed judgment as to its prospects was ready and willing to pay that price.*

It was proposed that the preferred stock would be convertible into common stock for a period of twelve years. Some objection was raised that this period was too long and that to be attractive and accomplish its purpose a conversion period should be relatively short.

IF any change in the conversion period were warranted, instead of being shorter there was justification for a longer period. No one can forecast how long the present low cost of money will prevail. It may well be that a preferred stock bearing a dividend rate of 4½ per cent will depreciate in value substantially below par if interest rates rise. And considering that the preferred stock may be outstanding for as long as there is an electric utility operating in Milwaukee, it is quite probable that the cost of money may increase while the stock is outstanding. Certainly, as long as the holder of preferred stock had the right to convert his stock into common stock, the risk of loss of principal was reduced.

It may be said that depreciation in value of preferred stocks occasioned by fluctuations in the cost of money is one of the risks inherent in the purchase of any security and should not be considered by regulatory authority. This is a narrow view as applied to low-dividend-rate preferred stocks of operating utilities.

The owner of a bond has a security with a fixed maturity date when its face value is payable. Hence, even though the market value of the investment declines because of an increase in the cost of money, the owner of the bond may, and frequently does, hold his investment to maturity. This is par-

ticularly true concerning high-grade bonds of utility companies, which are suitable for trust fund investment.

THE owner of common stock in a properly financed going utility has reasonable assurance that the return on his investment will maintain a market of approximately the par value of the stock. In fact, it is one of the aims of sound regulation and operation of utility operating companies to have the financial structure so sound that earnings on common stock will be sufficient to permit the sale of the stock publicly at its par value.

Thus, the bondholder is given some measure of protection against depreciation of his principal through the maturity date of his investment. The common stockholder is given a measure of protection by fluctuations in allowed rates of return designed to protect the principal; but, without the privilege of converting his stock into common stock, the holder of low-dividend-rate preferred stock is given no such protection and the depreciation of his principal is left entirely to the vagaries of the cost of money. Therefore, rather than a short conversion period, the right to convert preferred stock into common stock of an operating public utility for a substantial period of time is a desirable thing when the dividend rate on the preferred stock is fixed at the current low levels.

THE Wisconsin commission was particularly interested in the convertible feature of the preferred stock in view of the large number of local preferred stockholders. The 6 per cent preferred stock which was to be retired was held by 15,237 stockholders (excluding The North American Company, owning 78,710 shares) who held 203,388 shares. Of these, 13,629 stockholders, owning 177,425 shares, were Wisconsin residents. Hence, Wisconsin shareholders owned 62 per cent of the total issue and 2¼ times as much as The North American Company. Furthermore, the stock was distributed in small lots, there being 13,507 shareholders of the total of 15,237 owning from 1 to 25 shares each.

With such a large number of small Wisconsin shareholders the convertible feature of the new preferred stock was desirable, not only as a measure of protection of the principal of the investment, but as a means whereby substantial local ownership of common stock could be effected because the prospects were such that substantial conversion was expected over a period of years.

The objection to convertible preferred stocks on the grounds that they

"THE *owner of common stock in a properly financed going utility has reasonable assurance that the return on his investment will maintain a market of approximately the par value of the stock. In fact, it is one of the aims of sound regulation and operation of utility operating companies to have the financial structure so sound that earnings on common stock will be sufficient to permit the sale of the stock publicly at its par value.*"

are undesirable and are not favored appears to be largely a statement of personal opinion. There may be those in regulatory circles who honestly believe that it is undesirable to have preferred stocks outstanding which are convertible into common stock. But regulation of security issues of utility operating companies should not be based upon the personal opinion of the regulator as to what type of security is or is not desirable. The test should be whether the proposed issue meets statutory requirements.

In a given situation there may be more than one way to accomplish a refinancing program, any one of which would meet the requirements of the statutes. If this be the case, there is no occasion for a regulatory commission to say that the refinancing shall be accomplished in only one particular manner. To do so impinges on the right of management.

Wisconsin statutes have provided for the effective regulation of securities of public service corporations since 1911. The statutes provide several requirements which must be met before an issue may be approved; but fundamentally the major purpose of these requirements is to afford reasonable protection to possible purchasers of the securities to be issued. That is the test which must be made, and not whether the particular form of the financing, provided it conforms to the requirements of the statute, is one which individual members of the commission or its staff would have followed if they were in charge of the management of the company.

Perhaps the public utilities division of the SEC believed that the issuance of convertible preferred stock might in some way affect integration proceedings involving The North American Company. It may be that The North American Company will be required to dispose of some of its holdings of securities of operating utilities, and securities of Wisconsin utilities may be included in those which must be sold. Perhaps the existence of an outstanding preferred stock having a call on common stock might hinder, in some way, the sale of The North American Company's holdings. Such contingencies, however, should have no effect on the granting of exemption under § 6(b) of the act. When, as, and if integration plans are sufficiently definite so that it is known what is to happen, they might be of some significance in connection with the financing of a local operating utility; and even then it is doubtful whether it is proper that they be considered. To do so might result in undue weight being given the interests of the holding company in passing on security issues of local operating utilities. And financing which benefits the holding company is not necessarily beneficial to the public investors in and the consumers of the local utility.

Regardless of the particular objections SEC may have had with respect to the convertible stock, it should have granted exemption under § 6(b) of the Holding Company Act. The issue was solely for the purpose of financing the business of a subsidiary of a registered holding company. The issue had been approved by the Wisconsin commission. That commission found that the issue complied with the provisions of Chapter 184, Wisconsin Statutes, and that the financial condi-

tion, plan of operation, and proposed undertakings of the company were such as to afford reasonable protection to the purchasers of the security. These findings are not meaningless; they are required under a statute which confers broad jurisdiction over security issues of public service corporations. A statute which declares that the right to issue securities by a public service corporation is a special privilege, the right of supervision, regulation, restriction, and control of which shall be vested in the state. A statute under which effective regulation of utility securities has been exercised since 1911; and yet a statute the effect of which was nullified in this instance by administrative interpretation of the Public Utility Act of 1935.

True, the Wisconsin commission can withhold approval of securities of Wisconsin utilities on terms dictated by SEC and the utility could not issue them. But that would be a "dog-in-the-manger" attitude serving only to stymie any financing by the local utility.

And how does SEC assume this jurisdiction of security issues of local utilities? By a little clause in § 6(b) of the Public Utility Act which exempts certain issues "subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers." The extent of statutory authority embodied in the "terms and conditions" clause has not yet been determined. It seems inconceivable, however, that it grants authority to nullify state regulation of securities of local operating utilities. In Re West Penn Power Co., File No. 32-196, Release 2009, 34 PUR(NS) 36, Commissioner Healy stated, in a separate opinion, that:

"True, we have authority to impose terms and conditions which are appropriate in the public interest or for the protection of investors or consumers. However broad this power may be (see United States *v.* Lowden [1939] 60 S Ct 248), it was not intended that it be used to accomplish what might be accomplished if the securities were to be adjudged in light of the standards of § 7 and thus in form grant exemption and in substance deny it and also thereby ignore the rights of local regulatory bodies. (Cf. Palmer *v.* Massachusetts [1939] 308 US 79, 31 PUR(NS) 242.)"

And further that, "I am inclined to believe that Congress . . . . desired not to encroach upon the jurisdiction of state commissions and thus desired to grant an exemption from our act to the issue and sale of securities which were subject to the approval of a state commission. Lack of effective state regulation was one of the reasons for the enactment of the Public Utility Holding Company Act. But where complete regulation by a state commission is present, it may well be that it was not intended that we have jurisdiction to refuse to approve an issuance of securities."

In the interest of economical and effective regulation of security issues of local operating utilities by the states, it is hoped that Commissioner Healy's opinion, as expressed above, will become the standard of the commission.

Wire and Wireless Communication

PRESENT telephone rates in the St. Paul metropolitan area are left unchanged through a Minnesota Supreme Court decision of July 5th upholding the state railroad and warehouse commission.

The high tribunal held the commission was acting within its authority when on May 2, 1939, it modified a 25 per cent rate reduction order of March 31, 1936. The May 2nd order set rates considerably higher than the 1936 order.

Rates established May 2, 1939, now are in effect. Net cost to residential subscribers was not changed in a commission order June 12th, which promulgated schedules to become effective July 31st.

Rates of March 31, 1936, had been upheld by both Ramsey County District and state supreme courts when the May 2, 1939, compromise was reached. Main element in the compromise was that the Tri-State Telephone and Telegraph Company agreed not to appeal the 1936 rates to the United States Supreme Court.

Joseph C. Lenihan and Joseph P. Kilroy, St. Paul telephone subscribers, attacked the May 2nd order as void on grounds it was not preceded by rate hearings. The city of St. Paul and Ramsey county intervened on the side of Lenihan and Kilroy. Judge Gustavus Loevinger of Ramsey County District Court held the May 2nd order void.

The telephone company appealed and the recent supreme court ruling resulted. Meanwhile, the June 12th order this year prescribed substantially the rates established in the May 2nd order. Service and other special charges were cut an estimated $77,000 a year, but residential phones were left at levels of the May 2nd order.

There was no indication at the time of the decision that the city, county, or Lenihan and Kilroy would appeal to the United States Supreme Court from the Minnesota tribunal's ruling. The effect was that telephone rates now appear to be stabilized in St. Paul for a considerable period. The opinion, written by Associate Justice Andrew Holt, said:

> Regardless of the fact that the order of May 2, 1939, was made without notice of hearing, without taking of testimony, and the claimed deficiency as to findings, it is nevertheless valid.

Lenihan et al. v. Tri-State Telephone & Telegraph Co. Minnesota Supreme Court. July 5, 1940.

* * * *

JUSTICE Francis Bergan dismissed in the state supreme court at Albany a petition of the public service commission for an order to force the New York Telephone Company to refuse telephone service to hotels not following the schedule of rates fixed by the commission for telephone calls by hotel patrons.

In an order effective on January 1st, the commission limited hotel surcharges on telephone calls to 5 cents for local calls and 10 cents for toll calls and took the attitude that the telephone companies had authority to regulate telephone calls since the hotels acted as agents for the

company. Although most hotels in the state obeyed the commission's ruling, a few did not, and the New York Telephone Company instituted a friendly suit against the Bowman-Biltmore Hotels Corporation, operator of the Commodore hotel, to test the validity of the commission's order.

In his decision of July 11th, Justice Bergan held that the reasonableness of the commission's rate schedule was a matter to be decided by the courts, with the hotels represented in the proceedings. Whether the commission had jurisdiction to regulate hotel telephone rates and to direct the New York Telephone Company to make the hotel its agent, he held, was a question judicial in nature "and not wholly legislative and regulatory." *New York Public Service Commission v. New York Telephone Co. New York Supreme Court. July 11, 1940.*

* * * *

TRANSPORT Minister Howe announced in the Canadian Commons recently that "within a reasonably short time—the shortest possible time—sponsored news on the air will be a thing of the past."

A complete new policy more satisfactory to radio listeners is being evolved, the Minister said in reply to a question by Conservative Leader Hanson as to whether the news broadcasting permit of Trans-Radio News had been reinstated.

Mr. Howe said Walter Thompson, Montreal, would investigate the whole question of news broadcasting in Canada and would make a report to him from which the new policy could be developed. Mr. Thompson, publicity director for Canadian National Railways, has previously served the government as press officer for the Royal tour, as chief press censor, and later as director of public information.

* * * *

To provide telephone communication from points where this service is not convenient, the New York Telephone Company has introduced a "telemobile," a specially constructed motor coach with five soundproof public telephone booths and the services of an operator attendant. The unit can establish contact with the regular telephone system by either underground cables or with overhead wires or cables.

In emergencies, it was said, the telemobile can be dispatched to the scene to provide police, fire, and other authorities and newspaper men with telephone service. The coach, identified by a lighted sign reading "Public Telephones," is equipped with its own power plant or can be connected with available power supply as required.

The booths are equipped with handset phones, seats, writing shelves, and fan ventilation. The cars also have a directory cabinet and two additional seats for persons waiting to make calls.

* * * *

REDUCTIONS of approximately $52,000 annually will be made in interstate rates of the Southern Bell Telephone and Telegraph Company in the southeastern states, the Federal Communications Commission announced recently. The reduced rates will go into effect August 1st.

The FCC said the reductions were made as a result of conferences between representatives of the company and the commission.

The new schedules will be the same as the interstate rates of the American Telephone and Telegraph Company now in effect. Reductions will be made for distances of more than 42 miles, the rates remaining unchanged for shorter distances.

* * * *

LAWYERS for the Southwestern Bell Telephone Company gave notice on July 3rd that they would appeal to the Supreme Court of the United States a decision of the Arkansas Supreme Court that the company had discriminated against two Fayetteville business houses. They requested the clerk of the Arkansas Supreme Court to prepare a transcript of the proceedings.

The Arkansas court, with two justices

dissenting, held last April that the company must pay two cafe operators, Mrs. Carrie C. Lee and S. B. Hanna, a total of $1,340 in penalties for failing to provide services at the same rate paid by other Fayetteville business firms.

Mrs. Lee said she was offered service for $3.50 a month if she would place the telephone in a place not easily accessible for use by the public. She refused, declining to install a telephone on the counter for $10.50 a month, and filed suit.

Mr. Hanna asked the company to remove a coin telephone from his cafe but was refused service at the $3.50 rate.

* * * *

RADIO listeners demoralize telephone service at Pine Bluff between 5:45 and 6 P. M. daily, the Southwestern Bell Telephone Company complained to the Arkansas utilities commission on July 9th. A quiz program is scheduled at that hour on a radio station. The announcer asks 10 questions during the quarter-hour. The first listener who reaches the station over one of its two telephones and offers the correct answer to a question receives a prize.

Telephone company officials told commissioners at a hearing that the moment the first question is asked over the air, the entire switchboard at the exchange "lights up like a Christmas tree."

Manager B. J. Parrish of the radio station said the studio receives about 20 telephone calls during the broadcast. Telephone officials said that after the first call reaches the station, scores of other subscribers remove receivers from the hooks and the switchboard becomes a mass of lights. To all but a few of the callers the "line is busy."

It's impossible to handle the traffic, the commission was informed. Commissioners planned to go to Pine Bluff to investigate.

* * * *

To curb any possibilities of sabotage to their country-wide communications system, the American Telephone and Telegraph Company has restricted admittance to operating rooms, a company spokesman said at New York recently. The spokesman said the company was "looking ahead" and taking precautions now for any eventualities. District offices have been advised to check carefully on visitors.

The Southwestern Bell Telephone Company at St. Louis recently formed a committee of general department heads to guard against "interruption of service or invasion of privacy" in telephonic communications as a national defense measure. This company also has restricted admittance to some of its buildings.

Additional watchmen and guards have been added to vital points or "nerve centers" of the Southern Bell Telephone and Telegraph Company's units as a counter move against any possible sabotage, company officials said last month.

Following other utility companies of the nation in coöperating with the national preparedness and defense program, the Atlanta, Ga., branch has withdrawn its invitation to the public to visit its units and watch the telephone system at work. No one is allowed to visit the "vital places" without a special pass from company offices and all visitors who have business at the various points are accompanied by an escort. This rule applies to employees of the company.

Employees in the Des Moines office of the Northwestern Bell Telephone Company have been warned "to be alert to any incidents which may arise" but no unusual precautions have been taken to prevent possibility of communication sabotage in the Des Moines area, telephone company officials said.

* * * *

THE International Telephone & Telegraph Corporation recently announced that its subsidiary, the International Telephone Development Company, had received an order (exceeding a half-million dollars) from the Civil Aeronautics Authority to manufacture and install airplane instrument landing systems at six of the nation's leading airports.

Financial News and Comment

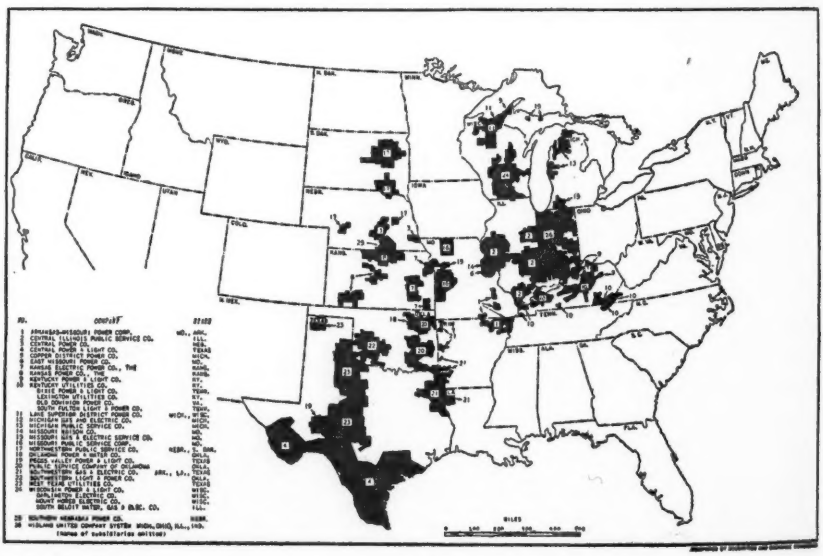
By OWEN ELY

Middle West As Test Case for Integration

PROGRESS with the various holding company integration cases has slowed down somewhat. The SEC's utility division has issued two tentative plans, for Cities Service Power & Light and Middle West Corporation, and the commission itself is considering a plan for United Gas Improvement. North American Company has dropped its plan on failure to agree with the commission. The decision announced a few weeks ago, that the SEC would advise the companies of its own views, now seems indefinite; there is said to be a difference of opinion within the commission as to whether it should merely advise how many systems a top holding company may control, or whether it should specifically name the systems.

It is reported that the SEC is now hopeful of pushing the Middle West integration plan as a test case, but other systems are reported unenthusiastic about coöperating in the filing of briefs, etc. The utilities are said to feel that the Middle West system, with its complications surviving from Insull days, is not typical, and that much stronger arguments for retention of operating subsidiaries could be advanced by other systems.

As indicated in the attached chart, Middle West properties are scattered throughout a broad belt of states running north and south through the middle section of the country. The organization chart indicates that the largest subhold-



ing company, Central and South West Utilities, controlling a group of companies in Texas, Oklahoma, and Arkansas, will have to be simplified from the standpoint of corporate structure.

PRINCIPAL subsidiaries and their approximate 1939 net income are:

Arkansas-Missouri Power	$ 284,000
*Central Illinois Public Service	1,912,000
Central Power Co.	188,000
Central & So. West Utilities	3,495,000
Kansas Electric Power	470,000
Kentucky Utilities Co.	1,520,000
Michigan Gas & Electric	173,000
†Missouri Public Service	113,000
North West Utilities Co.	677,000
Oklahoma Power & Water	137,000

*Not included in consolidated financial statement.

†Middle West proposes to sell 31% of the common stock of Missouri Public Service.

In 1939 the consolidated system earnings statement showed net income (excluding Central Illinois Public Service) of $4,120,492, but of this amount only $1,716,046 reached the parent company.

Middle West was reorganized in 1935, but the status of various system properties is still somewhat confusing, and many readjustments remain to be carried out if all affiliated companies are to be brought in line with the Utility Act, and placed in sound financial condition.

Since reorganization, the parent company's earnings on its 3,308,355 shares of common stock (the sole capitalization) have been as follows:

Calendar Year	*System Basis*	*Parent Company*
1939	$1.24	$.43
1938	.81	.40
1937	.57	.23
1936	.49	.16

No dividends have yet been paid. Middle West is currently quoted on the New York Curb around 6½.

New Financing in Sharp Rebound

BOND prices were not so seriously affected by the battle of France as by the outbreak of war last September, and have again recovered most of their decline. Plans for corporate financing, held in abeyance for several months, are now being actively pushed, and new issues have generally met with a good reception.

In the holiday week ended July 5th there were only two small municipal offerings, but in the week of July 12th a number of issues, large and small, were floated—$60,000,000 Texas Corporation debenture 3s; $10,000,000 Scovill Manufacturing debenture 3¼s; $32,000,000 Indianapolis Power & Light first 3¼s of 1970; and an assortment of smaller rail and municipal bonds. The Indianapolis syndicate was headed by Lehman Brothers, Goldman Sachs, and First Boston Corporation. The corporation offerings were quickly absorbed. El Paso Natural Gas sold an additional $2,500,000 of its first 3½s of 1953 to a group of insurance companies at 98½, and may sell another $500,000 later.

Other current utility issues are $10,000,000 Iowa Southern Utilities Company first 4s of 1970 and $2,660,000 general 4½s of 1950 (delayed since May), offered by a Langley-Halsey, Stuart syndicate at 101 for both issues; and $50,000,000 Cleveland Electric Illuminating first 3s due 1970, offered by Dillon, Read & Co. at 105½. Eighty-five underwriters and several hundred dealers helped to dispose of this issue. Another issue expected shortly is the $2,350,000 Arkansas-Missouri Power 4s of 1965 at 102 (E. H. Rollins heading the syndicate).

Other finance projects now in the discussion stage include the United Gas issue, referred to elsewhere; $15,000,000 Public Service Electric & Gas 3s (to be sold to insurance companies), also possibly a $50,000,000 issue to retire the present 3½s of 1965; and $10,000,000 Potomac Electric 3¼s for plant construction.

Associated Gas & Electric system trustees are reported considering the sale of "trustee certificates," possibly to the extent of $50,000,000, to help eliminate intercompany security holdings. Jersey Central Power & Light Company (affiliated with Associated Gas), which recently refunded $42,000,000 bonds,

may attempt a similar operation for its three series of preferred stocks totaling $22,000,000.

A subsidiary of Niagara Hudson Power may also be in the market with a small bond issue to finance new construction.

The SEC has granted First Boston Corporation permission to accept a fee of 11/32 of 1 per cent for acting as agent in the private sale of $22,500,000 Indiana & Michigan Electric first 3¼s.

United Gas Refunding Plan

UNITED Gas Corporation, natural gas subsidiary of Electric Power & Light, is planning a $75,000,000 refinancing program in order to simplify the capital structure, reduce fixed charges, extend maturities, and settle $10,000,000 dividend arrears on the first preferred stock.

Registration of $60,000,000 30-year first mortgage bonds and $15,000,000 serial notes—the current vogue in financing—is expected at an early date. The underwriting group will probably be headed by Dillon, Read & Co. and Bonbright. Securities to be redeemed include the following: $4,238,000 Houston Gulf Gas first 6s, $3,900,000 Houston Gas Securities collateral 5s, $1,850,000 Houston Gulf Gas debentures 6½s, $28,925,000 United Gas Corporation 6 per cent notes, and $25,000,000 United Gas Public Service debenture 6s.

Electric Bond and Share owns the entire issue of United Gas 6 per cent notes and also the $25,000,000 United Gas Public Service debentures. Hence, that company will receive approximately $54,000,000 cash but, on the other hand, will lose annual income of over $3,200,000. Since Electric Bond has not been covering its preferred dividend with a very substantial margin, it appears necessary either to reinvest the money at once to insure a similar return or to retire some of the preferred stock, presumably by asking for tenders. The $6 preferred is currently selling around 71, the range this year being 51-73¼. If the company should ask for tenders around 75 they could retire about 722,000 shares; at 80, about 677,000; and at 90, 600,000. At last reports there were outstanding 300,000 shares of $5 preferred and 1,155,655 shares of $6 preferred.

THE securities of Electric Power & Light have been strong recently, since that company may benefit in future by the proposed settlement of arrears on United Gas first preferred. This would pave the way for dividend payments on the second preferred stock, of which the entire outstanding 884,680 shares are held by Electric Power & Light (which also holds 3,795,086 shares of common stock and 3,600,040 option warrants). United Gas in the twelve months ended April 30th earned $13.73 on the first preferred stock, and $3.42 on the second preferred, on a consolidated basis; parent company earnings were only $8.72 and $0.88, respectively. The company paid $8 last year and $4.50 thus far this year on account of first preferred arrears, reducing the accumulation to about $23. Arrears on the second preferred amount to about $58 per share.

Electric Bond and Share has small investments in the first preferred stock of United Gas and in the first and second preferred stocks of Electric Power & Light, together with large amounts of the common stocks and warrants of both companies, hence it will receive some small benefits from the clearing up of United Gas arrears, both in cash and in the increased value of its holdings.

United Gas first preferred is currently selling at 110, the 1940 range being 113½-87¾. If arrears are paid off in cash, and regular dividends are paid in the future, this would mean a net price (ex-arrears) of about 87, to yield over 8 per cent.

Amending the Securities Acts

BANKERS are said to desire a merger of all four acts now administered by the SEC, which maintains a separate division for each law—the Securities

Act, the Securities and Exchange Act, the Public Utility Holding Company Act, and the Trust Indenture Act. Provisions of these laws are often in conflict, and each requires the filing of voluminous data, frequently involving considerable duplication of work and expense.

Some of the principal conflicts are between the provisions of §§ 11 and 12 of the Securities Act, and the liability features of the Securities and Exchange Act; a company may conform fully to the former while still incurring liabilities under the other.

Regarding registration, it is suggested that a class of "public stocks" should be created. These companies would be required to register with the SEC regardless of whether their stocks are listed on an exchange, or whether they wish to issue new securities. Such registration, kept up to date by periodic reports, would eliminate the necessity of special registration statements when securities are issued.

It is also suggested that §§ 9-A-2 and 16-B, known as the "antimanipulative" and the "insiders" sections, should be clarified and made less stringent.

It is unlikely, however, that serious work will begin on a general overhauling of these laws until after election, or next January. Meanwhile the SEC and the bankers are reported in virtual agreement over an immediate amendment to the 1933 act, to cut down the 20-day waiting period (in the commission's discretion).

Unlisted Trading Facilities for Utility Securities

THE SEC has indicated that it may permit stock exchanges to offer unlisted trading facilities to many securi-

UTILITY BONDS WHICH EARNED CHARGES IN 1939 AND YIELD 5-8½%
(ARRANGED IN ORDER OF YIELD)

	Mkt. Price	*Current Yield*	*No. Times Charges Earned*	*1940 Range Low*	*High*
General Wtr. Wks. & El. deb. 5/43	99½	5.0%	1.84	89	101
Eastern Gas & Fuel coll. 4/56	80½	5.0	1.41	74¾	85½
Brooklyn Union Gas * deb. 5/50	96	5.2	1.69	84	98½
Tide Water Power 1st 5/79	96	5.2	1.46	88½	103½
Community Pwr. & Lt. coll. 5/57	93½	5.4	1.67	81	97¼
Pacific Pwr. & Lt. 1st 5/55	93	5.4	1.70	86	97⅞
North Amer. Lt. & Pwr. deb. 5½/56	100½	5.5	2.68	94	103
New England Pwr. Assn. deb. 5½/54	100	5.5	1.57	93	100⅞
Federal Wtr. Serv. deb. 5½/54	99	5.6	1.36	89	101½
Illinois Pwr. & Lt. deb. 5½/57	98	5.6	1.37	87	101½
Puget Sound Pwr. & Lt. 1st 5½/49	98	5.6	1.58	86	100½
Cont. Gas & Elec. deb. 5/58	90½	5.6	1.55	80	94
Amer. Pwr. & Lt. deb. 6/2016	100	6.0	1.42	90¾	105⅞
Virginia Pub. Serv. deb. 6/46	99½	6.1	1.50	94	101½
Utah Pwr. & Lt. deb. 6/2022	98	6.1	1.51	85	101¾
Elect. Pwr. & Lt. deb. 5/2030	82½	6.1	1.19	70	84½
Fed'l. Lt. & Trac.* deb. 6/54	99	6.1	2.26	99	104¼
Southwest. Pwr. & Lt. deb. 6/2022	97½	6.2	1.42	90	105¼
Portland Genl. Elec.* 1st 4½/60	71¼	6.3	1.59	65½	81¼
Cities Serv. Pwr. & Lt. deb. 5½/52	87	6.4	1.49	76¼	92⅜
Genl. Pub. Utilities coll. 6½/56	100	6.5	1.60	83	100⅜
Nevada Calif. Elec. tr. 5/56	71½	7.0	1.23	62	83
Indiana Service 1st 5/50	72	7.0	1.18	57	73⅝
United Light & Pwr. deb. 6/75	84½	7.1	1.36	73	89½
Georgia Pwr. & Lt. 1st 5/78	67	7.5	1.08	59	75
New England Gas & Elec. deb. 5/50	64½	7.7	1.12	51	71½
Standard Gas & Elec. deb. 6/48	71	8.5	1.18	49	74½

*Listed on New York Stock Exchange; others on Curb.

ties of registered utility companies which are now traded over-the-counter. The New York Curb Exchange has been permitted to give unlisted trading facilities to certain bond issues of American Gas and Electric, Public Service Company of Colorado, and Washington Water Power, as well as the preferred stock of American Gas. The SEC decided that these securities were covered by requirements substantially equal to those which the Securities and Exchange Act of 1934 impose on listed securities, the exceptions being unimportant.

News Digest

MAJOR utilities with large recent weekly gains in output over last year are American Water Works (15 per cent), Detroit Edison (14 per cent), Electric Power & Light (15 per cent), National Power & Light (12 per cent), and Niagara Hudson (18 per cent). Some companies making a less-than-average showing were Boston Edison, Columbia Gas, Commonwealth Edison, Consolidated Edison, Northern States Power, and United Light & Power.

Fifty-five leading waterworks companies showed an increase in gross of 3.9 per cent and a gain in net of 4.1 per cent last year, according to a study by R. E. Swart & Co. Fixed charges were covered 2.09 times.

Is there any such thing as intrastate commerce? Former distinctions between intrastate and interstate business, so far as utilities are concerned, seem to be rapidly breaking down. In the Consumers Power Case, the United States Circuit Court of Appeals found that the company was engaged in interstate commerce merely because it sells power to manufacturers whose products, such as cars, are sold on a nation-wide basis.

Electric appliance sales continue to show substantial gains over last year. Sales of refrigerators by manufacturers in May were 41 per cent over last year, while electric range sales were up 34 per cent.

International Telephone & Telegraph reported net of $406,500 for the first quarter compared with $261,367 for the same period last year, but these results excluded all European, Mexican, and cable and radiotelegraph subsidiaries. President Behn said factories in the occupied areas of Denmark, Norway, Belgium, and Holland are still operating, though on a reduced scale. French factories were not damaged, although some of the machinery was transferred before the evacuation of Paris. Spain and Rumania are the only European countries where International operates the telephone service. The Rumanian territory recently seized by Russia contains only about 10 per cent of the telephones operated in that country.

INCREASED market interest in Brooklyn-Manhattan Transit recently has been due to continued firmness of New York city bonds, received by the company for its properties, and expectations are that net worth may work out better than the early estimate of $24.61 a share. However, because of tax problems, it is uncertain how soon stockholders can look forward to full liquidation.

In the first half of the year the Bell system showed a gain of 449,000 stations against 370,000 last year. Toll calls were 6½ per cent greater and may be further stimulated in the second half by election and defense activities. The system earnings of $10.89 for the twelve months ended May 31st showed an unexpectedly large gain of 21 per cent over last year. The company now has about 632,398 stockholders, the largest list in the world, although the present figure is about 1 per cent less than in December, due probably to foreign selling.

Southeastern Electric and Gas Corporation will merge with its subsidiary, Southeastern Investing Corporation; the SEC under its new Rule U-8 granted approval without hearing.

INTERIM EARNINGS STATEMENTS

Electric and Gas	*No. of Months Included*	*End of Period*	*System Earnings per Share (a) Last Period*	*Previous Period*	*Per Cent Increase*	*Per Cent Decrease*
American Gas & Electric	12	May 31(b)	$2.92	$2.38	22%	..
American Power & Lt. (Pfd.)	12	May 31(b)	6.96	5.12	35	..
American Water Works	12	Mar. 31(c)	1.17	.48	143	..
Boston Edison	12	Mar. 31(c)	9.12	8.84	3	..
Cities Service P. & L. (Pfd.)	3	Mar. 31	11.22	10.80	4	..
Columbia Gas & Electric	12	Mar. 31(c)	.63	.39	61	..
Commonwealth Edison	12	Mar. 31(c)	2.29	2.30	..	..
Commonwealth & Southern (Pfd.)	12	May 31(bc)	9.14	8.35	9	..
Consolidated Edison, N. Y.	12	Mar. 31(c)	2.28	2.08	9	..
Cons. Gas of Baltimore	12	May 31(c)	5.00	4.33	16	..
Detroit Edison	12	May 31	8.02	7.51	7	..
Electric Bond & Share (Pfd.)	12	Mar. 31	6.78	6.41	5	..
Elec. Power & Lt. (1st Pfd.)	12	Apr. 30(c)	8.22	5.99	38	..
Engineers Public Service (d)	12	May 31(b)	1.74	1.28	36	..
Federal Light & Traction	12	Mar. 31	2.69	2.28	18	..
Inter. Hydro-Elec. (Pfd.)	12	Mar. 31	5.35	5.36	..	..
Long Island Lighting (Pfd.)	12	Mar. 31(c)	5.34	5.24	2	..
Middle West Corp.	3	Mar. 31	.32	.24	34	..
National Power & Light	12	May 31	1.23	1.15	7	..
Niagara Hudson Power	12	Mar. 31(c)	.47	.55	..	15%
North American Co.	12	Mar. 31(c)	2.01	1.71	18	..
Northern States Power (Cl. A)	12	Apr. 30	3.07	D.36	..	..
Pacific Gas & Electric	12	Mar. 31	2.89	2.53	14	..
Public Service Corp. of N. J.	12	May 31(b)	2.86	2.66	7	..
Southern California Edison	12	Mar. 31(c)	2.40	2.18	10	..
Standard Gas & Electric (Pr. Pfd.)	12	Mar. 31	9.42	3.09	205	..
United Gas Improvement	12	Mar. 31	1.08	1.00	8	..
United Light & Power (Pfd.)	12	May 31	8.49	5.85	45	..
Gas Companies						
American Light & Traction	12	May 31	1.69	1.57	7	..
Brooklyn Union Gas	12	Mar. 31(c)	2.43	2.78	..	13
El Paso Natural Gas	12	May 31	3.87	3.61	7	..
Lone Star Gas	12	Mar. 31	1.27	1.03	23	..
Pacific Lighting	12	Mar. 31	2.85	4.79	..	41
Peoples Gas Light & Coke	12	Mar. 31(c)	4.19	2.95	42	..
United Gas Corp. (1st Pfd.)	12	Apr. 30	13.73	11.09	24	..
Telephone and Telegraph						
American Tel. & Tel.	12	May 31(c)	10.89	8.99	21	..
General Telephone (e)	12	Mar. 31(c)	2.51	1.88	33	..
Western Union Tel.	5	May 31	.89	D.64	..	..
Traction Companies						
Greyhound Corp.	12	Mar. 31(c)	2.41	..	..	..
N. Y. City Omnibus	3	Mar. 31	1.06	1.24	..	15
Twin City Rapid Tran.	3	Mar. 31	.20	.33	..	40
Systems outside United States						
Amer. & Foreign Pwr. (Pfd.)	12	Dec. 31	6.21	6.83	..	9
Inter. Tel. & Tel. (f)	3	Mar. 31	.06	.04	50	..

D—Deficit.
(a) On common stock, unless otherwise indicated following name of company.
(b) Data also available for month indicated.
(c) Data also available for quarter indicated.
(d) Excluding Puget Sound Power & Light Company.
(e) Including General Telephone Allied Corporation.
(f) Excludes all European, Mexican, and cable and radiotelegraph subsidiaries.

What Others Think

Should Regulatory Commissions Lose Their Independence?

THE war and politics have shifted immediate attention from more academic speculations about regulatory control. At a time when whole nations, such as the Republic of France, are being swallowed up by the theory of the centralized corporative state, and when our own Federal government has to call on emergency powers to get our rearmament program working on all cylinders, it seems somewhat anticlimactic to discuss the problem of whether different regulatory commissions and bureaus ought to head up under the executive, judicial, or legislative branches.

And yet, assuming without question that democracy will endure in America, this question of what to do with the control of governmental agencies, which in turn control an ever-increasing area of business, remains unsolved. And unless Congress takes unexpected action in passing the Walter-Logan bill during the remainder of the present session, nothing even approaching a solution is likely to be attempted for some time.

What is the problem? It is the increasing belief that present governmental agencies engaged in the regulation of business, labor, agriculture, and so forth, are not functioning satisfactorily; that they could be improved with respect to their organization, their procedures, and their relationships to the public and to the other branches of government. In a volume recently released by the Brookings Institution, Frederick F. Blachly and Miriam E. Oatman give us an analysis of this pressing problem which we must solve some day and a proposed solution. The volume is entitled "Federal Regulatory Action and Control."

THE reason why we have become so sensitive to the shortcomings of Federal regulation, according to these authors, is clear enough. During the last half-century there has been an astonishing extension of Federal control into the realm of private economic activities. Starting out with modest semiadvisory organizations, such as the forerunner of the present Interstate Commerce Commission, Congress has increased and intensified the administrative controls of the Federal government until today there are between six and seven hundred statutory provisions which are applicable to private economy in one way or another.

And now we have come to a point where fear is expressed that independent commissions are becoming a law unto themselves; that they are disregarding constitutional rights of individuals; or that, on the other hand, they tend, by virtue of their independence, to become administrative bottle necks and at times may even block policies of the Federal government which may be held politically responsible for their conduct.

Blachly and Oatman sum up three doctrines which have been advanced for improving the work of Federal regulation and bringing it into more harmonious relationship with our constitutional system. These conflicting theories are called:

1. The doctrine of executive management.
2. The doctrine of judicial formula.
3. The revisionist doctrine.

The authors go on to explain that the first plan would be to have the chief executive control the functions of the various administrative boards and regulatory tribunals. This is urged in the interest of efficiency, economy, and political responsibility. Incidentally, the original Brownlow committee report, upon which President Roosevelt's ill-fated Reorganization of Administrative Agencies bill

was predicated, would have made the Federal government the principal boss of just about everything on the government payroll, inside and outside of Washington, except the courts and Congress itself—both of the latter stripped down to bare essentials.

It may be recalled that one of the first portions of this program which the New Dealers had to throw overboard was the proposal to put the SEC, the FPC, the FCC, and other administrative agencies under control of various old-line departments directly responsible to the President through their cabinet heads. It will also be recalled that the reorganization bill as finally enacted was only a shadow of its former self, which leaves the various boards and commissions just as independent as they ever were.

Opposed to the theory of executive management is the argument that centralized control tends toward dictatorship and a suppression of individual rights and constitutional guaranties. As an extreme example, one might point to certain totalitarian countries where even the administration of justice in such important cases as capital crimes has been delegated to some intradepartmental tribunal.

At any rate, this appears to be what the lawyers fear in propounding the second alternative noted above—the doctrine of the judicial formula. This fear of "administrative absolutism" has taken form in proposals endorsed by the American Bar Association, which resulted, with changes, in the Walter-Logan bill still awaiting congressional action at this writing.

In order to deprive the central administration of its alleged power to injure, the proponents of this doctrine would make the courts, rather than the executive branch, the real boss of the regulatory commissions. The latter would be given very little discretion and would be compelled to act, as far as possible, in accordance with the judicial formula of notice and hearing, followed by a decision. Practically everything the commissions did would be subject to judicial review.

Opposed to this shift in ultimate control of administrative bureaus from the executive to the judicial branches is the argument that there might result a chaos of legalistic red tape. After all, the basic theory of regulation is to set up a tribunal of experts for the handling of complicated business and economic affairs which neither the courts nor Congress is qualified to supervise. If the actions of such expert bodies are to be subject to review *de novo*, regulation becomes cumbersome, dilatory, expensive, and perhaps, eventually, hamstrung. So runs the gist of the argument against the judicial doctrine of reforming our technique of administrative control.

The third doctrine—the revisionist doctrine—is the one espoused by the authors, Blachly and Oatman. They describe it in part as follows:

> *The revisionist doctrine.* The revisionist doctrine sees in the present Federal administrative system a fairly satisfactory adaptation of structure and relationships to function. At the same time, it advocates certain improvements. It takes the position that in establishing administrative agencies for particular purposes, Congress has acted, on the whole, both wisely and consistently. Hence the administrative structure is not a haphazard assemblage of miscellaneous parts. It is a system, and an organic system, in which specialized organs perform differentiated functions. Further evolution, however, can improve the system.
>
> The revisionists point out such facts as the following. In the course of the past fifty years the Federal government has been confronted with important new problems, particularly in the field of economic control. That it might meet these problems, the government has been compelled to assume numerous functions which it had not previously carried on, and to allocate these functions to authorities. It has necessarily established suitable organizations to carry on these newer activities, many of which involve sublegislative and subjudicial action. Among such authorities are the independent boards and commissions. Because these organizations are so largely concerned with action legislative and judicial in nature, it has been thought necessary that they should have a position of independence from the Executive.
>
> Because the regulatory process might in-

terfere with personal or property rights by commanding or compelling something to be done or by refusing to permit something to be done, special forms of action were developed which (1) enable the government to function in its sublegislative and subjudicial capacity, and (2) at the same time guarantee that as it does so, individual rights shall be protected. The guaranties include statutory delimitations of the scope of administrative acts and requirements as to procedure; also, when necessary, the application to these acts of such judicial controls as the statutory injunction and the review of administrative action by the courts upon the transcript of the record. Special types of enforcement methods were also developed, by which the acts of the newer authorities could be made effective.

IT is recognized that step by step—as new situations arose, Congress, the courts, and the administrative authorities themselves have thus been building an administrative system, the general outlines of which are beginning to emerge quite clearly. The first step towards improvement, say the revisionists, is to understand the present system, its strength and its weaknesses. Instead of abolishing the independent commissions, as the "executive doctrinists" would do, or instead of cutting them down to the status of mere trial examiners for our judicial system, our commissions and administrative boards should be improved and strengthened. Specific improvement is urged by Blachly and Oatman in the following directions:

1. In maintaining the independence of authorities which are carrying out long-time regulatory processes.
2. In further development of the system of administrative legislation and adjudication.
3. In establishing a high constitutional administrative court to hear appeals from administrative action involving a case or controversy.
4. In more exact differentiation of the various forms of administrative action, particularly as regards applicability to specific situations; legal nature and effect; procedural requirements; methods of enforcement; and control over each type of action.
5. In simplifying administrative judicial procedure, and, where possible, in making it more uniform. Particular attention should be given to the trial examiner and his relationship to the regulatory authority.

The authors suggest that these changes should be made one by one, only after considerable study of detailed problems in each instance. Considered and harmonious development, based on scientific research, they say, will not only leave the regulatory system intact but will add to its strength and stability, while at the same time broadening and developing it to meet the expanding needs of a living democratic system.

—F. X. W.

FEDERAL REGULATORY ACTION AND CONTROL. By Frederick F. Blachly and Miriam E. Oatman. The Brookings Institution, 722 Jackson Place, N. W., Washington, D. C. Price $3. 356 pp. 1940.

A Single Volume Critique of Recent Public Power Projects

DURING the past seven years there has been no dearth of purported analyses of the various electric power projects sponsored by the Federal government, either through direct construction or indirect subsidy. But, for the most part, such studies have been fragmentary and have appeared one by one in a wide and scattered range of newspaper serials and magazine articles.

For those interested in more than one project of the Federal power program, there has been no single volume where pertinent data along this line have been collected. Now comes Ernest R. Abrams, a writer well known to regular readers of the FORTNIGHTLY, with a volume which admirably supplies this long-felt need—an assembly of up-to-date, factual materials concerning the different units of the Federal power program.

It must be noted right off that Mr. Abrams' analyses are quite generally critical as to the economic justification of these projects. Therefore, if one were resolved to complete the other side of the

"AUNT SOPHIE ADVERTISED FOR SOMEONE TO BRING LIGHT AND WARMTH TO A LONELY LIFE AND THE ONLY REPLY SHE GOT WAS FROM THE GAS AND ELECTRIC COMPANY"

picture, a companion volume to Mr. Abrams' work—one somewhat more sympathetic to the Federal government's program—would be indicated.

However, the author does not write with such a partisan tone as to invalidate confidence in his conclusions. Indeed, much of the statistical field traversed by Mr. Abrams is of such a factual nature that there is little margin for trying to manufacture a case one way or the other. In addition, Mr. Abrams' frank reportorial manner commands respect and consideration even from those who might differ with his conclusions.

SPECIFICALLY, Mr. Abrams has made a cost analysis (in a general way) of each project, giving the historical background; surveyed the national resources and population figures of each area involved; and assembled totals showing the amount of power it can produce and the consumer possibility for both the present and future.

In dealing with engineering problems, the author supports his judgment by authentic documents and such questions as whether flood control, navigation, or power is the main objective in each case, and whether cost allocation for each function, if any, is equitable. On the whole, the author concludes that some of the projects will pay their way in time, others won't—and still others should never have been given serious considera-

tion in the first place. To this conclusion he adds a final word on government ownership, as follows:

> Purely from an economic viewpoint, most students of our national economy will agree with Doctor Morgan [former TVA chairman], and yet only the extremely naïve or those blinded with a reformer's zeal will fail to foresee that the breakdown of state control over local rates and service conditions, the substitution of national for state jurisdiction over intrastate production and sale of electricity, would effectively establish in the United States the greatest political machine ever created in a modern country, with control over the location of and expenditures for power plants and transmission lines, with authority to increase or reduce the price of electricity to homes and farms, to stores and factories, and, therefore, with ability to influence the votes of electric consumers in the country. For while Doctor Morgan specifically emphasized that "the success of public ownership will extend only so far as it can be divorced from political patronage," and that "if we greatly increase public ownership, then the doctrine that 'to the victor belongs the spoils' will spell the doom of social and economic decency and health," nothing in our experience with public power activities of either state or national governments during the seventy-five months under review would warrant any assumption that political convenience and expediency will not continue to dominate public power undertakings.

Among the projects reviewed there is a separate chapter devoted to those in the Northwest, those in the Southwest, the Central South, the Central North, the Southeast, and Northeast, respectively.

—F. X. W.

POWER IN TRANSITION. By Ernest R. Abrams. Charles Scribner's Sons, 297 Fifth Avenue, New York, N. Y. Price $3. 318 pp. 1940.

Milk Distribution As a Public Utility

ALTHOUGH regulation of the old-line public utilities, which are common carriers, gas, electric, and telephone companies, has been criticized on the basis of effectiveness, there has never been a time when reform elements did not have new candidates in readiness for introduction to the group of regulated industries known legally as public utilities. For nearly a decade milk producers in many markets have been demanding and obtaining public assistance in the regulation of satisfactory prices. While this price maintenance has had a stabilizing effect, and while it has mollified the milk producers, it has by no means provided a lasting cure.

Recently there have been repeated requests for more adequate information concerning the general subject of milk distribution, and particularly on the methods of lowering the spread between prices paid by consumers and those received by producers. There have been numerous suggestions that milk be made a public utility like water, gas, and electricity. The agricultural experimental station at the University of Wisconsin, in its capacity as a publicly supported research agency, inaugurated a study of this proposal which was placed under Professor W. P. Mortenson. The result is a volume on the subject of milk as a public utility, recently released through the University of Chicago Press.

PROFESSOR Mortenson found that one-half of the dollar paid by city consumers for fluid milk (as distinguished from manufactured milk) goes for processing and distribution. This means that the farmer gets only 50 cents out of the consumer's dollar. This fairly high cost of distribution (which does not seem greatly out of line with meat packing, truck vegetables, and other food commodities) has been criticized by scores and studied by many. But while facts have been gathered and revealed as to what makes for the high distribution cost, no one has yet found a way of greatly reducing the charge.

Professor Mortenson found that the wide margin between what the consumer pays at his doorstep and what the farmer receives is common everywhere in our cities.

Inasmuch as salaries and wages paid

by milk distributors constitute the next important operating expense after the compensation of the producing farmer (nearly 25 per cent of the consumer dollar), it appeared that substantial economies might be obtained through unification. This would mean giving to milk distributors the monopolistic status similar to that of the regular public utility company and would necessarily imply a similar brand of regulation.

Furthermore, the elimination of such duplicate facilities as extra milk wagons (with their drivers) would be at the expense of employed labor to a great extent. Similar savings might result in other expense factors, such as depreciation, profits, repairs, utility service (power, light, and water), advertising, and taxes. But the amount of savings through unification from these minor expense items would proportionately be of minor consequence.

Summing up his analysis of operating costs, Professor Mortenson estimated that savings through the unification of milk distribution, based on a 5-cent distribution cost per quart of milk, would be between 1¼ cents and 1.923 cents.

THE author has a chapter on the legal phases of milk distribution and finds that while so far the United States Supreme Court has not ruled upon the legality of direct utility control of the milk business, there have been precedents, notably in the case of Nebbia *v.* New York, 219 US 502 (1934). There is also a chapter on possible public ownership of milk distribution, with conclusions by the author rather critical of such proposal.

On the merits of the general proposal that milk distribution should be regulated as a utility, Professor Mortenson lets the reader draw his own conclusions. He points out the difficulties and advantages. From these it would appear that from the standpoint of a disinterested observer the case for milk distribution under a unified system is strong. It is also strong from the standpoint of the milk consumer. On the other hand, from the standpoint of the distributor and of organized labor, such a proposal would undoubtedly meet opposition. As to the farmer-producers, especially the organized producers, the author could not see that the change would be of much advantage to them, although they might be converted to it.

—F. X. W.

MILK DISTRIBUTION AS A PUBLIC UTILITY. By W. P. Mortenson. The University of Chicago Press, 5750 Ellis Avenue, Chicago, Ill. Price $2.50. 221 pp. 1940.

A Handbook on Wage-Hour Law Administration

THE Bureau of National Affairs, located in Washington, D. C., has recently released a publication intended as an authoritative guide to employers subject to regulation by Federal or state governments on the subject of wage and hour standards. It is intended also as a guide for employees for the purpose of showing them what their rights are under Federal and state laws regulating wages and hours.

The manual is a handy-sized volume divided into three parts. The first is an interpretive reference source to the Federal Fair Labor Standards Act, topically arranged with regulations and decisions. This part is divided into fifteen chapters which explain, among other things, how the wage-hour law operates, the formation of industries committees, coverage of the act and exemption for industries and occupations, child labor regulation, the keeping of records, and an index of the Federal act with its legislative history, rules, and regulations.

Part II of the manual explores, in a similar fashion, labor standards that must be observed by those bidding on contracts with the Federal government. Separate chapters of Part II explain

the stipulations relating to wages and hours that must be made by Federal contracts under the Davies-Bacon Act, the Eight-Hour Law, and the Anti-Kickback Act.

Part III deals in the realm of state labor standards regulation. It covers the same ground for state wage-hour laws as Part II does for the Federal statute. Such state laws affecting intrastate industries are digested together with state wage orders which have been issued under such laws. A complete topical index makes available every item of information in this comprehensive guide to the solution of wage and hour problems.

THE compilers of this volume, which is quite full of factual and authoritative information on labor standards legislation, have obviously harrowed, raked, and strained all available administrative bulletins, news releases, and official statements on the subject.

For example, suppose one is interested in the application of the Fair Labor Standards Act to the telephone industry—a utility business which has found the wage-hour requirements a particularly troublesome problem. Under "Telephone Exchanges" in the index there are eleven references. These include: The text of the Herring-Ramspeck Amendment (exempting operators in smaller telephone exchanges from the application of the Federal law) and an interpretation thereof; then, a series of state wage orders affecting telephone exchanges; and references to administrative opinions as to whether a hotel telephone operator, or telephone operators in general, are exempted as "service establishments" under the act.

This seems a pretty fair sample of the degree of thoroughness exercised by the compilers of this book in presenting Federal and state wage-hour legislation in brief but comprehensive detail.

WAGE AND HOUR MANUAL. 1940 Edition. The Bureau of National Affairs, Inc., Washington, D. C. Price $5. 648 pp.

A New Textbook on Utility Rate Making

RECENTLY released by the McGraw-Hill Book Company is a text volume which purports to cover the entire field of utility rate making, including valuation, service, discrimination, and rate structure. It is the joint work of John M. Bryant, professor of electrical engineering of the University of Minnesota, and Raymond R. Herrmann, rate engineer of the Northern States Power Company. We are informed in the preface that this text has evolved from a lecture course in valuation and rates for public utilities given by Professor Bryant to advanced students in engineering in the universities of Texas and Minnesota during recent years, and from the practical experience of Mr. Herrmann.

The work starts out with a rather novel introduction which defines some of the more unique characteristics of the utility service as distinguished from other industrial operations and excludes from the scope of the volume any consideration of the merits of government ownership of utility services.

The book is bottomed solidly upon a wealth of case law from courts and commissions. This alone has the effect of bringing up to date substantial portions of some of the older encyclopedic text. For that reason, it seems deserving of ready acceptance as a valuable reference source for the utility lawyer and the utility engineer alike—as well as others whose duties bring them into serious contact with the routines of utility regulation.

THE book is divided into seven sections, entitled respectively: Valuation, Depreciation, Expenses, Return, Discrimination, Rates, and Service. The

"SURE, LADY, WATER IS NATURE'S GIFT; BUT THERE'S A SLIGHT CHARGE FOR DELIVERY"

style is quite simple and, with the exception of a few mathematical formulae, should be readily understood by various professionals and nonprofessionals having occasion to use the work. Perhaps the greatest value of this volume is to provide a readily accessible short cut to an authoritative review of case law on numerous subdivisions of regulatory inquiry, which can be quickly found in the excellent index provided in the back of the book. The authors have industriously gathered together, under a logical plan of presentation, a great mass of the case references obtained from published law reports (principally *Public Utilities Reports*).

It is as a result of this very comprehensive treatment of case material that some ground for minor criticism may be found. The large number of older cases tends to give the appearance of outweighing, by their very preponderance, later citations which may be more truly important as a matter of guiding principle.

This is not to reflect upon the taste of the authors in recognizing trends or in making necessary distinctions. It is simply a question of stress and impression. For example, under the topic "going concern value," the authors rightly recognize (page 103) that as a result of more recent cases a separate allowance for this item has just about disappeared. But such recognition is dismissed in three paragraphs after five pages of review of earlier cases in which "going

concern value" used to cut a more substantial figure. The same might be said of the recognition of the trend among modern commissions towards original and prudent investment in rate valuations notwithstanding earlier Supreme Court precedents of a contrary tendency.
—F. X. W.

ELEMENTS OF UTILITY RATE DETERMINATION. By John M. Bryant and Raymond R. Herrmann. McGraw-Hill Book Company, New York, N. Y. Price $4.50. 464 pp. 1940.

Notes on Recent Publications

INCONSISTENCIES IN PUBLIC UTILITY DEPRECIATION—DEDUCTION OF DEPRECIATION FOR RATE BASE PURPOSES. Robert D. Haun. 38 *Mich. L. Rev.* 479. February, 1940.

AN INTRODUCTION TO CORPORATE ACCOUNTING STANDARDS. By W. A. Paton and A. C. Littleton. American Accounting Association, 6525 Sheridan Road, Chicago, Ill. Price $1. 156 pp. 1940.

Accounting theory is here conceived to be a coherent, coördinated, consistent body of doctrine which may be compactly expressed in the form of standards if desired. This discussion of the framework of accounting standards seeks no extensive reform of corporation practices. The aim has been to present a theory basis by means of which corporation accountants may be helped to make a realistic appraisal of their practices and public accountants may be aided in reviewing corporation reports. The authors had the benefit of the criticisms of members of the Executive Committee of the American Accounting Association.

RECAPITALIZATION UNDER SECTION 11 (e) OF THE PUBLIC UTILITY HOLDING COMPANY ACT. Analytical note in 49 *Yale Law Journal* 1297. May, 1940.

Under the rule first laid down in a 1936 decision of the Delaware Supreme Court in Keller *v.* Wilson, 190 Atl. 115, corporations of many states found it difficult to amend their charters to provide for the elimination of accrued and unpaid dividends on cumulative preferred stock, even when such action is appropriate or necessary for the financial rehabilitation of the corporation. Now comes an SEC decision in Re Community Power & Light Company (decided November 27, 1939, Holding Company Act Release Nos. 1803-4) which approves a plan of recapitalization without reference to state court decisions. This decision, according to the foregoing article, offers a possible release from the rigid requirements generally imposed on such plans by state courts. Whether the SEC is justified in its action will probably require a determination of its statutory and constitutional power under § 11(e) of the Holding Company Act.

Possibly in order to escape the apparent restrictions of the Keller Case, the Community Power & Light Company sought to effect a voluntary recapitalization under §11(e), as distinguished from compliance with a regulatory order which the commission itself might initiate under §11 for "integration" of the holding company systems. This article is an analysis of the need for such freedom of action in order to adjust hopeless financial burdens without undue violation of the equities of various classes of security holders.

Under the plan approved in the Community Power & Light Case, preferred stockholders now have voting control of the reorganized company and will be able to require the payment of dividends as the financial condition of the company permits. Common stockholders are benefited in turn by the early prospect of dividend payments. Under the original corporate set-up there was small possibility of eliminating dividend arrears within ten years and a complete reorganization was necessary to reëstablish the corporation's credit.

The article takes up the contention that §11(e) cannot be construed to allow the SEC to rearrange stockholders' rights so as to conflict with the law of the state of incorporation. It was pointed out that the Holding Company Act makes no reference to the standards set by state courts in requiring the simplification of corporate structures. It is submitted that it would be to the disadvantage of all concerned if the courts required that as a matter of statutory construction a plan engineered under §11(e) must meet the requirements of state decisions as to "vested rights."

It was concluded that the SEC should not be restricted by decisions of either state or bankruptcy courts, where it finds that any plan calling for a greater sacrifice on the part of common stockholders would be unfair, in view of annual earnings exceeding dividend requirements on preferred stock.

STATE REGULATION OF GAS AND ELECTRIC COMPANIES. Radio address by J. W. Alsop, chairman, Connecticut Public Utilities Commission. WDRC. April 23, 1940.

The March of Events

TVA Speed-up Voted by Committee

THE House appropriations subcommittee on deficiencies on July 9th approved a bill appropriating $25,000,000 to the Tennessee Valley Authority for power expansion to speed up aluminum sheet production for airplane wings after several members of the National Defense Advisory Commission urged such action.

Termed a "critical" item in the defense program, the project includes the construction of a dam on the Holston river, a tributary of the Tennessee river, above Knoxville, to provide 90,000 kilowatt hours of power, and a steam plant to produce 120,000 kilowatts.

The Aluminum Company of America, which manufactures the aluminum sheets, would be allotted 120,000 kilowatts to run a new plant which would be constructed simultaneously with the new electric producing units. Completion by 1942 was predicted if a start is made immediately.

Representative Rayburn, the majority leader of the House, was asked to sit in on the hearing to hear the statements of Edward R. Stettinius, Jr., William S. Knudsen, members of the commission, Gano Dunn, electrical consulting engineer, and David E. Lilienthal, vice chairman of the TVA board, testify as to the urgency of the development.

Mr. Stettinius was reported to have told the subcommittee, headed by Representative Woodrum of Virginia, that the advisory commission would not accept responsibility for failure to remove the lack of power there as a "bottle neck" in the plane production program.

When Representative Woodrum on July 11th asked unanimous consent for the immediate consideration of the bill, Representative McLean of New Jersey interposed an objection. This brought from Representative Rayburn of Texas a disclosure that he had entered into an agreement with more than one hundred members not to bring up anything controversial on the 11th, the last day before Congress recessed for the Democratic National Convention. As long as there was controversy over the matter, Mr. Rayburn indicated he would not permit the resolution to be considered.

It was generally expected that the appropriation would be approved soon after Congress resumed.

TVA Program for Cumberland Valley Urged

MEMBERS and directors of the Cumberland Valley Association met last month at Nashville, Tenn., to discuss plans for sending delegates to Washington to advocate inclusion of the Cumberland river valley under the TVA program.

W. D. Hudson, member of the Tennessee Railroad and Public Utilities Commission, and a director of the Cumberland Valley Association, told the group he would do everything in his power to make the Cumberland valley "a part of the TVA where it rightfully belongs."

J. P. Owens, secretary of the organization, told the members it is now the "psychological time" to send delegates to Washington to urge development of the Cumberland valley as part of the TVA or a vital factor in the preparedness program with abundant hydroelectric power resulting from the construction of dams at a number of places.

The group planned to adopt a resolution calling upon members to raise funds for the purpose of sending representatives to Washington to sponsor the desired legislation.

Congress Approves Rate Bill

THE Boulder dam rate adjustment measure was approved on July 11th by the House and Senate on the eve of a 10-day congressional recess which threatened to delay final action on the long overdue legislation.

Reducing rate and interest charges at the great hydroelectric plant and providing other important changes in the financial structure of the dam, the bill was sent to President Roosevelt for his signature—terminating a bitter 3-year fight in Congress.

A conference report, eliminating certain amendments which were not acceptable to the House conferees, was adopted by the Senate following a futile attempt by Senator Chavez (D.), of New Mexico, to send the measure back to conference a second time. In the House it was approved within a few minutes under a unanimous consent agreement.

Approval of the bill represented a victory on the part of Los Angeles power experts who have spent the better part of three years working with representatives of the Department of Interior and members of the basin states congressional delegation on a revision

bill which would be acceptable to the seven Colorado basin states.

Principal changes in the Boulder dam rate structure included the designation of the Los Angeles Bureau of Power and Light and the Southern California Edison Company, Ltd., as operating agents for the government; payment of $300,000 a year to Arizona and Nevada (in lieu of taxes which they would have received from any privately owned project at the dam site); payment of $500,000 a year to all of the Colorado basin states for surveys and development—with the upper basin states receiving the entire sum for a specified period of years—and the transformation of the entire project from a competitive to an amortization basis.

Interest rates will be chopped from 4 per cent to a figure in the vicinity of 3 per cent and power charges also will be reduced. A $25,000,000 item for flood control will be deferred until the end of the 50-year amortization period.

Railroads Free Cars

IN a move to conserve transportation capacity "to meet any demands which may develop in connection with national defense preparations," the Association of American Railroads recently issued a rule against using open-top cars for storage purposes.

The association ordered, effective July 15th, that no coal cars be placed for loading at mines where more than one day's supply already is being held under load and unconsigned. Such cars are called "no-bill" coal loads. More than 41,000 cars loaded with coal and unconsigned were reported being held at mines, the association said, adding that this "represents a waste of potential transportation capacity which can be avoided."

Alabama

REA Projects OK'd

THE Alabama Finance Department recently granted consent for five rural electric coöperatives in the Tennessee valley to issue notes aggregating almost $1,500,000 for acquisition of properties of the Alabama Power Company, the TVA, and for building new lines.

The state finance department's okaying of notes for that part of the money to be used for purchase of Alabama Power Company facilities was made contingent upon approval by the state public service commission. Action by the finance department covered requests by the coöperatives as follows:

Cherokee Electric Coöperative, operating in Calhoun, Cherokee, DeKalb, Etowah, and Marshall counties—$158,000.

San Mountain Electric Coöperative, in DeKalb and Jackson counties—$312,000.

North Alabama Electric Coöperative, in Jackson, Madison, and Marshall—$281,000.

Cullman Electric Coöperative, in Cullman, Marshall, Morgan, and Winston—$250,000.

Joe Wheeler Electric Membership Corporation in Lawrence and Morgan—$128,000 for acquisition of Alabama Power Company properties and construction of new lines, and $325,000 for acquisition of TVA distribution properties.

Property Sale Approved

CONTRACTS under which the Alabama Power Company will sell more than $4,000,000 worth of its properties in the Tennessee valley area to the TVA, municipalities, and coöperatives were approved recently by the state public service commission.

The deal was described in the records as the final step in a plan of long-term adjustment of relations between the TVA and private utility companies, and involved properties in Jackson, Madison, Limestone, Lauderdale, Colbert, Lawrence, Morgan, Marshall, DeKalb, Cherokee, Cullman, and parts of Franklin and Winston counties.

In its petition the power company asked authority to sell approximately $4,600,000 worth of its holdings, but the commission retained jurisdiction in the case until negotiations for the transfer of properties in Arab, Boaz, Red Bay, and several other communities are completed. The commission estimated the value of the company properties at "less than $400,000." The company will continue to operate them until a final settlement is made.

Arizona

Court Modifies Rule

THE state supreme court on July 1st modified its opinion in the Tucson Gas, Electric Light & Power Company income tax case, holding that payment of interest on Federal income taxes "is deductible from income under the Federal law."

The lawsuit involved an effort of the state tax commission to collect an additional state in-

come tax levy from the utility firm. Last June the court, with a few exceptions, ruled against the commission.

However, the ruling met objections from attorneys on both sides concerning deductions of interest paid on Federal income taxes.

Arkansas

Utility Not Monopoly

THE door to competition among natural gas companies was opened on July 1st by the state supreme court in a precedent-setting opinion. The tribunal upheld the right of the Louisiana-Nevada Transit Company of Oklahoma to operate in southwest Arkansas in competition with the Arkansas Louisiana Gas Company, a pioneer in the distribution of natural gas. (See also p. 189.)

Associate Justice E. L. McHaney wrote the opinion to which no dissent was voted.

Specifically, the decision reversed Pulaski Circuit Court which had vacated an order by the state utilities commission granting the Louisiana-Nevada a certificate of convenience and necessity to serve gas at Okay, Howard county, and at Hope. The state supreme court ordered the commission's order reinstated.

The state utilities commission subsequently announced that the Louisiana-Nevada Transit Company had offered to serve any municipality with natural gas, when accessible to its new system in southwest Arkansas, at 10 cents per thousand cubic feet. The rate would be applicable when the gas was bought at the "town gate" at wholesale.

Referring to the state supreme court's recent decision, Commission Chairman Thomas Fitzhugh said:

"The entrance into Arkansas of a competing gas company already is forcing rates downward. And they may go down still further. One condition of the commission's order granting the Louisiana-Nevada a certificate to operate was that if the 10-cent rate proved more than sufficient to provide a fair return on the investment, an adjustment would be made."

Declaring evidence showed the Louisiana-Nevada Transit Company would "serve communities not now adequately served," the fifth circuit court of appeals on July 8th affirmed a Federal Power Commission order authorizing the new utility to construct and maintain a gas pipe line from the Cotton valley (Louisiana) field to Okay, Ark., through southwest Arkansas.

The Arkansas Louisiana Gas Company, which also serves southwest Arkansas, had asked the Federal court to review the order, contending that construction of pipe lines by Louisiana-Nevada would be a "useless and costly duplication of service." The court ruled that the evidence was sufficient to support the finding and order that "the present and future public convenience and necessity require the construction in question."

A petition asking that the Arkansas Louisiana Gas Company be required to file an inventory of its distribution system at Hope with the state utilities commission was filed with the commission by Hope officials on the same day. It asked a map of the system, data on the size and age of pipe lines and meters, lists of stations, real property, and administrative expenses. The petition was filed as a result of the state supreme court decision. City Attorney E. F. McFaddin of Hope has said the city was interested in acquiring the municipal distribution system.

State Commission Reports

RATE reductions amounting to $565,905 were effected by the state utilities commission between January 1, 1939, and May 1, 1940, the commission said in its fifth annual report issued on July 8th. The report, covering the calendar year 1939, also includes current information up to May 1, 1940, because its preparation was delayed "due to an unusual volume of work," the commission informed Governor Bailey. The report said that:

Rate reductions in 1939 aggregated $392,324.

In the first four months of 1940 the total was $173,581.

Since January, 1937, the utilities department has effected reductions totaling $853,810, a yearly average of $284,603.

Cost of operating the department during the 3-year period which ended January 1st was $276,336, a yearly average of $92,112.

The commission pointed out that the department reduced rates $3.09 for each $1 spent in operating the department.

"Since rate reductions not only reduce rates for the year in which they are made but continue in effect in succeeding years," the report continued, "the total accumulated customer savings since January, 1937, from rate reductions amounted to $2,908,498."

Coöperatives had spent $2,789,005 of their loans from the Rural Electrification Administration last October 31st, the commission reported. They served 4,300 customers and probably will serve 2,000 more from lines already built. Upon completion of the approved part of their program, the coöperatives will have invested $4,996,000 and built 5,340 miles of line to serve 13,544 rural members. Lines have 5,200 additional prospective customers.

Private utilities had invested $1,848,986 in building 2,370 miles of line to serve 10,333 rural customers, at the end of October, 1939. They expect to add 1,000 customers in 1940.

The commission also called attention to "more recent information that the REA has set aside $3,000,000 for Arkansas" in the fiscal year which started July 1st.

Utility Taxes Raised

OCCUPATION taxes for utility companies in Camden were raised considerably in two amendments to the tax ordinance adopted last month by the city council and approved by Mayor Don Harrell.

The levy for electric and power companies was set at $5,000 a year. The old rate was $150. Rate for gas companies was raised from $200 to $800 per annum, while telephone companies must pay $1,800 a year, compared with $600 formerly.

Emergency clauses were adopted on the two amending ordinances, effective immediately.

California

Scattergood Retired

E. F. SCATTERGOOD, general manager and chief electrical engineer of the Los Angeles power bureau since its inception, was retired on July 9th by the Board of Water and Power Commissioners at his present salary of $24,000 a year, and at his own request. Scattergood is in Washington where he is working on reduced rates for Boulder dam power.

Action of the board was unanimous. The retirement resolutions were introduced by Commissioner W. R. Fawcett, who has been the leader of the group, including James Agnew and William B. Himrod, opposed to many of Scattergood's policies. The minority members, favorable to Scattergood, were Watt Moreland and F. D. Howell.

To replace Scattergood, the board selected H. C. Gardett, who has been assistant chief electrical engineer.

Power Plan Pushed

GOVERNOR Culbert L. Olson recently announced that negotiations were in progress to assure public ownership and distribution of power from the Shasta dam, Central Valley Water Project, now under construction on the Sacramento river near Redding.

With this public ownership and distribution of power in mind, "complete coöperation and thorough understanding" are being established between Secretary of the Interior Ickes, the Federal Reclamation Bureau, and Frank W. Clark, state director of public works and chairman of the water project authority, Governor Olson said.

The governor added he had indicated to Secretary Ickes the public ownership program is regarded with disfavor by three elective members of the water authority, Attorney General Earl Warren, State Treasurer Charles G. Johnson, and State Controller Harry Riley.

Governor Olson said that Secretary Ickes had stated to him "that this situation makes it necessary for the Secretary of Interior to make clear the definite purpose that the state shall participate in the further development of the Central Valley's project and that the necessary steps for this participation must be taken."

Gas Cut Held in Order

ENGINEERS of the state railroad commission at a public hearing at Fresno last month testified the earnings of the San Joaquin power division of the Pacific Gas and Electric Company on the sale of gas would approach 8 per cent on the capital investment used as a rate base during 1940, and that a substantial rate reduction was in order.

On a basis of the engineers' preliminary report on studies of the system begun last January on the commission's initiative, a substantial rate reduction in Fresno and a lesser cut in Bakersfield were indicated by Commissioner Ray C. Wakefield.

Wakefield and Edward F. McNaughton, director of the public utilities department of the commission, said the gas rate cut would be recommended to the commissioners when a final report is made. Wakefield also said that while the preliminary report showed earnings of the corporation on its power sales approximate 6.1 per cent a "borderline case," it was possible readjustments in electric rates also might be recommended.

Rail board engineers had testified no power rate reduction should be made.

Indiana

Get Natural Gas

GAS bills in nearly a dozen central and southern Indiana communities served by the Public Service Company of Indiana and the Northern Indiana Power Company will be reduced approximately 30 per cent by a change from mixed to natural gas, officials of the utilities announced last month.

G. J. Oglebay, vice president of the Public

Service Company, said a contract had been signed with the Universal Gas Company, Owensboro, Ky., to provide natural gas at Greencastle, Cloverdale, and Martinsville, served by the Northern Indiana Power Company, and at Franklin, Edinburg, Columbus, Seymour, Mitchell, Bedford, and Bloomington, served by the Public Service Company of Indiana.

The changeover would require only the adjustment of consumer gas appliances to the higher heat unit of natural gas, since the companies' lines already are connected to the Universal Gas Company's pipe line extending in Indiana from Terre Haute to Martinsville.

Natural gas now is used in the mixture with which the cities are served. The mixed gas, with a BTU rating of 570, as compared with the 1,000 BTU's in natural gas, is a combination of natural and coke oven gas. This means that the natural gas has much higher heating energy.

Before the change is made, however, it must be approved by the affected towns and the state public service commission. No opposition was expected in the affected communities, since committees representing the towns have repeatedly sought the change to natural gas. It was explained the change necessarily would affect the gas rates, company officials estimating their annual income from gas consumers would be reduced 30 per cent.

The state commission on July 5th issued its first order on substitution plans of the two companies which meant natural gas, instead of the artificial product, for Jeffersonville, Clarksville, Claysburg, and Silver Hills.

In the four places designated in the commission's order, minimum rates will be raised from 75 cents to $1 a month. Rates will be the same in all four places, starting from a base of 23 cents for the first 100 cubic feet. The natural gas will be supplied from the Louisville Gas & Electric Company, which also has been providing the artificial products for the same vicinities.

Assessment Cuts Denied

PETITIONS for reductions in the assessments of five large Indiana utilities were denied recently by the state board of tax commissioners.

Representatives of the utilities appeared before the tax board on July 8th. Petitions presented by Frank M. McHale, Democratic national committeeman from Indiana, were those of the Northern Indiana Public Service Company, assessed at $43,800,000, an increase of $3,056,675, and the Chicago District Generating Company, assessed at $19,819,000, an increase of $999,360. Dean Mitchell, president of the Northern Indiana Public Service Company, also appeared for that firm.

The Public Service Company of Indiana, with a $2,200,000 increase boosting its assessment to $41,750,000, was represented by Glen Van Auken. He also appeared for the Northern Indiana Power Company, assessed at $10,375,000, an increase of $1,383,390.

The Indiana Service Corporation, with an assessment of $7,316,460, an increase of $678,260, was represented by B. P. Shearon, secretary of the company.

In each case, the assessment was attacked as discriminatory and unreasonable.

Kansas

Guard against Spies

NO more visitors will be allowed within the gates of the large branch of the Kansas Gas & Electric Company located on the Neosho river a few miles northwest of Columbus, officials of the company announced last month.

Company officials said the action was part of the government's efforts to protect large power plants in the United States from being the victims of espionage.

Franchise Refused

THE Columbus city council last month refused, by an 8-to-1 vote, to give the Empire District Electric Company another 5-year franchise to supply the city with electric power. There was said to be some local consideration of building a municipal plant.

The city's business men would be canvassed by a committee to get an opinion. If negative, the franchise might be granted later.

Kentucky

Voters Sign Petition

MAYOR Pierce E. Lackey on July 11th said petitions he had circulated to block sale of a 20-year power franchise to the Kentucky Utilities Company bore the signatures of approximately 4,000 voters, almost twice as many as are required to force a vote on the question at the November election.

The petitions would remain in circulation another week. Approximately 6,000 signatures would be on the petition when it is filed with

the board of commissioners, Mayor Lackey said. The board, according to the petition, would be asked to rescind its recent action in offering a new power contract for sale. If the commissioners ignore the petition, the power question automatically will be placed on the November ballot. Mayor Lackey and Commissioner Mary Dorian opposed adoption of the franchise ordinance, both claiming that the company "wrote the contract."

Minnesota

Study Car Fares

THE question of lower street car fares for school children was referred for further study to William Parranto, commissioner of public utilities, by the St. Paul city council last month.

Action followed presentation of an opinion by John McConneloug, city corporation counsel, that courts have not ruled on legal powers to force the St. Paul City Railway Company to make a differential rate.

The question was raised by the St. Paul Parent-Teacher Council, which had a special committee present to the city council a study of the experience of 38 cities in which differential rates are in operation.

Commissioner Parranto said he thought it "inadvisable" to begin any action regarding rates, since there was a possibility rate hearings before the state railroad and warehouse commission would result in higher street car fares because of the company's unfavorable financial situation under current rates.

Absorbs Federal Tax

ELECTRIC bills in St. Paul will not be increased as a result of the new Federal taxes that took effect July 1st to help finance the national defense program, according to a recent statement by officials of the Northern States Power Company.

The company will continue to pay the tax, including the increase, which amounts roughly to one-half cent per kilowatt hour.

Nebraska

Transfer Power Assets

FORMAL transfer of the Columbus area facilities of the Northwestern Public Service Company to the Consumers Public Power District of Columbus was consummated July 5th in the offices of John Nuveen & Co., Chicago, ending a move to bring municipal ownership of power to Columbus begun four years ago.

The Nuveen Company took over a $1,250,000 revenue bond issue bearing 3¼ per cent interest at 95. Of this sum, $1,190,975 was to go to the Northwestern Company. The original price agreed on when the lease-purchase agreement was made in October, 1939, was $1,209,000, but Consumers has since paid the company $19,000.

Bonds will be paid off at the rate of $50,000 annually from July 1, 1941, until July 1, 1961. The deal was believed to be the largest of its kind ever negotiated in Nebraska.

Power Franchise Approved

HOLDREGE citizens approved, 867 to 300, a 3-year franchise extension for the Western Public Service Company, whose old franchise expired June 2nd. Mayor L. A. Trumbo and city councilmen had opposed renewal of the franchise, but had put the matter to a vote in a special election, at the request of Holdrege business men.

The city has a municipal power plant which it operates in competition with the private utility. City power serves about three-fourths of the community's outlets.

New Jersey

Utilities Tax Certified

GROSS receipts taxes for 1940 totaling $6,418,229 were certified last month by New Jersey Tax Commissioner J. J. Thayer Martin, as the amount public utility companies must pay to the state for distribution to municipalities.

Most of the money will not be paid, however, until the high state courts dispose of an attack on 1940 laws which direct distribution of the utility tax by the state tax commissioner on the basis of standardized valuations fixed by himself rather than by the local assessors.

Payment of the tax by the utilities has been held up by the dispute.

New York

Transit Men Reclassified

THE 27,000 employees of the New York city transit system who worked on the Interborough and B-MT systems before unification are being reclassified by the Municipal Civil Service Commission, it was disclosed recently.

The reclassification is expected to be completed within a few months, and the men, whose ratings and wages are now fixed by the Board of Transportation, will receive permanent civil service titles.

The commission last month began a series of public hearings to determine the eligibility of certain groups of employees for permanent civil service status. The following groups have been summoned to appear before the commission:

Noncitizens who have not applied for first papers from the United States government.

Persons who have committed offenses, no matter how trivial, and failed to report them in answering the questionnaires sent out by the commission in advance of unification.

Persons who now fail to support their minor children.

Persons with felony records acquired since 1920.

Persons whose employment records show instances of willful neglect of duty or theft within the past five years.

Members of these groups unable to give satisfactory explanations to the commission may be dropped from the employment rolls. The commission has indicated, however, that it will follow no arbitrary rule, will handle each case on its merits, and will give the investigated individual the benefit of the doubt whenever possible.

Ohio

Gas Rates Approved

THE Springfield city council recently approved a 4-year gas rate ordinance estimated to yield the Ohio Fuel Gas Company an "average overall return" of 62.1 cents a thousand cubic feet. Consumers in Springfield now pay 60 cents a thousand.

A 48-cent rate ordinance has been in litigation before the state public utilities commission since 1932.

Plant Gets PWA Grant

UTILITIES Director John A. Hickey of Cleveland recently was notified that the Public Works Administration has granted the city an additional $69,482 for construction of the new 37,500-kilowatt municipal light plant generating station. This brought to $2,765,106 the amount PWA has given Cleveland in three grants for the project, which will cost approximately $6,000,000. Hickey said:

"While the additional grant is not as large as the $190,000 we asked for, our request included contingencies which can be eliminated. The new grant insures us having enough money to complete the plant."

Electric Rates Reduced

NEW rate schedules for the Cleveland Electric Illuminating Company went into effect July 7th, following approval by the state public utilities commission.

In addition to reduction in industrial tariffs, the new schedules provide for the following rates: Residential: First 35 kilowatt hours, 4 cents; next 65, 3 cents; next 150, 2.25 cents; excess, 1.5 cents; monthly minimum, 60 cents.

Commercial (less than 20 kilowatt hours): First 240 kilowatt hours, 4 cents; next 100, 3.3 cents; next 2,300, 2.8 cents; excess, 1.5 cents; monthly minimum, 60 cents.

At the same time the company was authorized to issue and sell $50,000,000 of new first mortgage, 30-year, 3 per cent bonds. The new issue is to redeem $40,000,000 in 3.75 per cent bonds outstanding and reimburse the treasury for $10,000,000 of expenditures for improvements.

Oklahoma

GRDA Data Sought

W. R. HOLWAY, chief Grand river dam engineer, said recently the national defense council had requested complete data as to the $22,750,000 Public Works Administration-financed hydroelectric project's power capacity and availability.

Similar information also was asked, he said, concerning the proposed Markham's Ferry and Fort Gibson dams which also would be on the Grand river. Cost of the two additional dams would approximate $12,000,000.

The Grand River Dam Authority authorized a survey of the three projects, to be completed within sixty days.

The Public Service Company had just previously offered the GRDA a 6-month option on its transmission and distribution system in eight northeastern Oklahoma counties for an undisclosed price. The company proposes to sell to the GRDA its facilities in Craig, Mayes, Delaware, Ottawa, Adair, Cherokee, and parts of Rogers and Wagoner counties.

The GRDA would be required to deposit $5,000 with the company if the authority accepts the option.

The Verdigris Valley Electric Coöperative, a rural power project which operates in parts of Rogers, Tulsa, Nowata, Osage, and Washington counties, also has begun negotiations to purchase power from GRDA.

Oregon

PGE Files New Schedule

THE Portland General Electric Company virtually completed its downward revision of all rate schedules on July 11th when it filed with the state public utilities commissioner at Salem a new tariff for large users of power, said by James H. Polhemus, president, to approximate the Bonneville wholesale rate.

The schedule currently affects five large industrial customers and is estimated to save them more than $100,000 annually. The new rate is 75 cents per month per kilowatt of billing demand, plus an energy charge of 2½ cents. The schedule is available to all users of power in excess of 3,000 kilowatts of demand at voltages of 50,000 or more.

Mr. Polhemus said the new rate would be particularly attractive to large users of power that have a load factor of 80 per cent or more and should have effect in attracting that type of industry to the Portland area.

Pennsylvania

Pipe-line Extension Voted

THE state public utility commission on July 15th approved applications of three Pennsylvania operating companies in the Columbia Gas & Electric system to link up a tri-state pipe line to transport natural gas from West Virginia into New York state.

The commission voted 4 to 1 in favor of the applications, with Commissioner Richard J. Beamish, Democrat, dissenting.

The action will allow the Manufacturers Light & Heat Company and the Manufacturers Gas Company, both of Pittsburgh, and the Pennsylvania Fuel Supply Company of Emlenton to build 117 additional miles of pipe line.

South Carolina

REA Seeks Cold Storage Plant

THE Rural Electrification Administration was reported last month to be negotiating for the purchase of a building in Columbia to be used as the first of a series of cold storage refrigeration plants in the state.

An act of the last legislature authorized the REA to construct and operate the plants in the state for farmers and others who wished to place their products in storage.

REA Director J. T. Duckett said that officers at Camp Jackson were particularly interested in the opening of the storage plant since there are no facilities at the camp for large-scale cold storage.

Tennessee

Civil Service for NES Opposed

THE Nashville Power Board, in regular session on July 10th, put itself on record as opposing the inauguration of any civil service system for Nashville Electric Service employees.

On motion of J. C. Bradford, the resolution was adopted with the explanation by the board that in its opinion the inauguration of a civil service system for employees would tend to inject politics into a business which was intended to be strictly nonpolitical and operated for the benefit of taxpayers.

The board, however, added to its resolution an instruction to the NES officials to investigate plans for employee retirement compensation and to submit a recommended plan.

The Latest Utility Rulings

Stock Acquisition by Holding Company to Change Status of Company Owning Stock

STANDARD Power & Light Corporation, a registered holding company, was permitted by the Securities and Exchange Commission to acquire 330,000 shares of its common stock, Series B, from H. M. Byllesby & Company, for retirement, where the latter company might as a consequence avoid the necessity of registering as a holding company. The Byllesby Company, as the owner of more than 10 per cent of the voting securities of Standard Power, was *prima facie* a holding company. Applications by Byllesby and its parent, The Byllesby Corporation, for orders declaring them not to be holding companies, and in the alternative for exemptions under the act, had previously been denied. As to this the commission said:

> The circumstance that this transaction, if consummated, will result in the removal of Byllesby from the class of companies which are *prima facie* holding companies, required under the act to register, is of course not material. We are not at this time faced with the question of the status of Byllesby under § 2 (a) (7) (B).

On its merits the proposed acquisition was not found to violate the standards of § 12 (c) of the Holding Company Act.

The proposal was to execute a contract with Byllesby pursuant to the terms of which Byllesby would be entitled to receive upon any distribution of the assets of Standard Power the proportionate share of the assets of the corporation to which the holder of the 330,000 shares would have been entitled had they not been surrendered. No participation in distributions of dividends, except liquidating dividends, was contemplated. In the event that the proposed contract should not be executed, Standard Power sought approval of the acquisition for retirement without the payment of any consideration.

No adverse findings because of the alteration of rights of security holders was deemed necessary, as the voting power of the holders of 110,000 shares of Series B common stock remaining after cancellation of the Byllesby stock would be increased, and the alteration of Byllesby's rights was at its request. *Re Standard Power & Light Corp. (File No. 70-85, Release No. 2140).*

FPC Bases Rates of Licensed Company on Net Investment

A RETURN of 6 per cent on the rate base of a federally licensed power company was used by the Federal Power Commission in establishing rates. Proceeding under Part I of the Federal Power Act, which applies to licensed projects, the commission ruled that net investment without consideration of reproduction cost is the starting point for determining the rate base, when the net investment does not exceed the fair value of the property.

Holders of licenses are required to accept terms and conditions which include a provision that in any valuation of the property of the licensee no value shall be claimed or allowed in excess of the value or values prescribed for purposes of purchase by the United States. The value prescribed for purchase is the net

investment when it does not exceed fair value, without any excess allowances for rights of way, good will, going value, or water rights in excess of cost. Although the commission determined the rate base according to its construction of the statute relating to licensed projects, it went further and expressed its approval of prudent investment as a rate base. It said that the fair value rule for rate making, with its speculative element of reproduction cost, has been demonstrated by experience to be delusive.

The Federal Power Act requires the deduction of the depreciation reserve if earned in excess of a fair return. This fact required a consideration of the depreciation reserve accumulated by the company by the sinking-fund depreciation method. The commission observed that the sinking-fund depreciation method is employed only with an undepreciated rate base. This is so because under the sinking-fund principle the entire service value is not charged to operating expense, but only the annuity is classified as an operating expense, while the calculated interest is charged to nonoperating expense. The commission adopted the 4½ per cent compound-interest depreciation method in preference to either the straight-line or sinking-fund method. Its statement on this point is quoted in part as follows:

> There is another method, called the compound-interest method, or sometimes the modified sinking-fund method, which accumulates a reserve in the manner and to the same degree as the sinking-fund method, but under which the reserve would be deductible in computing net investment. Under the so-called compound-interest method, both the annuity and the interest element are treated as operating expenses (under the title of depreciation), hence the full service value of depreciable property is charged to operations and accordingly the resulting depreciation reserve should be deducted in determining the rate base.

Commissioner Scott, in a dissenting opinion, disagreed with the allowance of 6 per cent for return. He was of the opinion that a 5½ per cent return was adequate in view of general interest rates and yields, utility interest rates and yields, general economic conditions, comparative risk data, financial history of the company and its parent companies, local conditions, and the company's position in a coördinated power system. All of these factors had been discussed by the majority. *Re Safe Harbor Water Power Corp. (Opinion No. 47, Docket No. IT-5494).*

Blitzkrieg against Rates Draws Fire of Minnesota Commission

A VIRULENT campaign to influence the official action of the Minnesota commission in a rate proceeding prompted the commission to criticize regulation by "intimidation." Fixing of rates, it was said, should not afford the occasion for sensational lawsuits ostensibly for the benefit of the subscribers but brought primarily for the profit of self-appointed champions of the people and counsel.

Following a rate order, involving a cash refund to telephone subscribers, as the result of negotiations to end litigation in the Tri-State Telephone and Telegraph Company Case, two subscribers in St. Paul unsuccessfully sought to restrain the rate order. They alleged fraud on the part of public officials, including the members of the commission. These allegations were ruled out by the trial court, but injunction was granted. The supreme court subsequently reversed the judgment and upheld the rate order. (See p. 159.)

The commission, in describing the attack, said:

> The campaign has been continuous but whenever the two subscribers, their counsel, the city of Saint Paul, or the county of Ramsey would make some move in the various telephone cases, or when the commission was about to take some action on the several matters before it, the campaign would intensify. It was carried on in the newspapers,

circular letters, pamphlets, public speeches, radio addresses and by other means. A corporation was formed to solicit the support of telephone subscribers. Even ouster proceedings before the governor were started against the three members of this commission.

If by such a campaign, the public be led to believe that certain private individuals, or that other agencies of government are more diligent or more anxious to obtain lower rates for the telephone subscribers than is the commission, it is unfortunate. We shall rely upon our official action in confidence that the public will appraise the entire matter fairly.

The commission observed that there can be no public benefit in litigation over rates which are admittedly fair and reasonable, that if all action by the commission and by other legislative and administrative commissions and bureaus of the state is to be subject to collateral attack and injunction because of some possible procedural defect, real or imaginary, not affecting the result or damaging the objector in any way, then indeed not only will effective telephone regulation be destroyed but governmental powers may be nullified.

The commission continued:

That regulatory plan will accomplish the legislative purpose and operate in the public interest only if all governmental agencies, state and local, administrative and judicial, discharge their respective functions in harmony and within the boundaries set by the legislature. There is no reason, within the regulatory plan, for lack of coöperation between the railroad and warehouse commission and every local subdivision within which the duties of the commission may require it to act.

As a result of its investigation the commission denied an application for increased rates, denied motions by the interveners to dismiss the proceedings, and ordered into effect rates calculated to produce a return of 6 per cent. *Re Tri-State Telephone & Telegraph Co. (M-2487).*

Property Transfer to Be Approved When Consistent with the Public Interest

AGAIN the much mooted question, whether absence of public detriment is sufficient to secure commission approval of a property transfer, has been decided by a court. The United States Circuit Court of Appeals reversed an order of the Federal Power Commission denying an application for approval of the transfer of properties. The commission had based its decision on the rule that the applicant must not only show that the proposed transfer is not detrimental to the public interest, but that the applicant must also show that the public will benefit.

The commission, according to the court, had ascribed a meaning to the statute not borne out by its language. Section 203 (a) of the Federal Power Act provides that after notice and opportunity for hearing, if the commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same. The court said:

The phrase "consistent with the public interest" does not connote a public benefit to be derived or suggest the idea of a promotion of the public interest. The thought conveyed is merely one of compatibility. Congress resorted to this language rather than to the use of the stock term "public convenience or necessity," or to such phrases as "in furtherance of" or "will promote the public interest" used in its interstate commerce legislation (later considered); and the language employed ought to be construed to mean no more than it says. It is enough if the applicants show that the proposed merger is compatible with public interest. The commission, as a condition of its approval, may not impose a more burdensome requirement in the way of proof than that prescribed by law.

The statute, it is true, prohibits the consolidation of the facilities of public utility companies without prior approval; but it does not disclose a policy hostile to all such mergers or indicate that Congress looked upon them as presumptively harmful. We see no more in the prohibition than the purpose of insuring against public disadvantage through the requirement of a showing that mergers of this sort will not result in detriment to consumers or investors or to other legitimate national interests. The Federal

Power Act forms an integral part of the Public Utility Act of 1935; and Title I of that act was designed to bring about a simplification of corporate structures in the utility field through compulsory consolidations and mergers under named conditions.

Decisions of state courts concerned with a similar question, it was said, are in line with this ruling. A commission contention that its construction of the statute had become settled by force of its own earlier decisions was rejected.

The commission had referred to a decision of the Supreme Court construing a section of the Interstate Commerce Act as supporting its conclusion, but the court found that the Interstate Commerce Commission was required to approve proposed consolidations or acquisitions if in harmony with and in furtherance of the plan for the consolidation of railway properties and promoting the public interest. The commission, declared the court, had wrongly quoted the verbiage of the underlying statute when it said that approval was required if the ICC found that such acquisition "will be consistent with the public interest." *Pacific Power & Light Co. et al. v. Federal Power Commission.*

Prescriptive Right to Operate Not Barred by Receipt of Operating Certificate

A COMPANY which has so-called grandfather rights, or prescriptive rights, to operate by reason of operation conducted prior to the enactment of a regulatory law is not, according to a decision of the Pennsylvania commission, barred from obtaining a registration of these rights by the fact that it has obtained a certificate of convenience and necessity under which it has operated.

This question arose when the holders of a certificate of convenience and necessity applied for registration of rights exercised by them prior to January 1, 1914, and continuously since to the present time. They had on December 4, 1933, obtained a certificate for common carrier operations. Carriers protesting against registration of the prior rights presented the following question of law as stated by the commission:

After submitting to the jurisdiction of the commission by the filing of an application for a certificate of public convenience and necessity, and having operated under a certificate granted pursuant thereto for a period of three years, has applicant now the legal right to apply for a certificate of registration under the provisions of Article III, § 12 of the Public Service Company Law?

The commission said this question must be answered in the affirmative on the authority of a decision by the superior court in Bickley *v.* Public Utility Commission (1937) 129 Pa Super Ct 115, 22 PUR(NS) 223. The commission considered it to be its duty to determine what rights, powers, and privileges as a common carrier of property the applicants possessed on January 1, 1914, and the rights, powers, and privileges so possessed and enjoyed and which the applicants continued to exercise until the filing of their application for registration. *Re Christie et al. (Registration Docket No. 88).*

Review of Commission Order Authorizing Municipal Plant Installation

THE supreme court of Wisconsin held that the commission may demur to the complaint in a proceeding to set aside a commission order authorizing a municipality to install a generating plant. A lower court order sus-

taining such demurrer was upheld.

On the appeal, the court said, it was met with a contention which raised a question of first impression so far as it was able to discover. The contention was made that the section pursuant to which the action was brought made no provision for a demurrer by the commission, that according to the terms of that section the commission is required to answer, and that the issue as to the unlawful or unreasonable order must be determined upon the record made before the commission unless additional testimony be taken as provided in another section.

The court said that while the proceeding was denominated an action, it did not conform to the statutory definition of an action as "an ordinary court proceeding by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." The court saw no reason why the commission might not properly demur. Moreover, while the question had not been raised in any of the previous cases, the practice had been so long recognized to permit a demurrer that the court hesitated to modify it for any except the most weighty and convincing reasons.

Additionally it was decided that an electric utility company which had been selling electric current to the municipal plant had no interest which entitled it to maintain the action. While the statute provided that any public utility may bring an action, that must be understood, said the court, to mean a public utility with an interest in the controversy.

The electric company had no such interest although it had a remote financial stake in the controversy. If the city could be prevented from generating its own electricity, it would be obliged to take service from the company.

On the other hand, while the possibility of loss or damage seemed remote under the facts of the case, nevertheless it was considered that a taxpayer being dissatisfied with the order might maintain the action. The contentions of the taxpayer were, however, rejected. The court sustained the power of the commission to grant the certificate, denied the power of the commission to interfere with the managerial duty of the municipality as a proprietor of its plant in deciding whether to install a generator, and denied the right of the taxpayer to contest the constitutionality of the statute under which his proceeding was brought. *Wisconsin Hydro Electric Co. et al. v. Wisconsin Public Service Commission et al. 291 NW 784.*

Natural Gas Company Not Protected from Competition in Arkansas

THE Arkansas Supreme Court reversed a lower court decision which set aside an order of the commission granting authority for natural gas extensions by the Louisiana-Nevada Transit Company in competition with the Arkansas Louisiana Gas Company. The court said that the "transportation and distribution of natural gas is a business which should not be immune to competition."

Review of a commission decision, the court held, is quite limited; review should not extend further than to determine whether the department has regularly pursued its authority. The court added, however, that this does not mean that the court cannot inquire beyond mere formality. If the department's order is supported by substantial evidence, free from fraud, and not arbitrary, said the court, it is the duty of the court to permit it to stand, even though it might disagree with the wisdom of the order. On the important question of competition the court declared:

> The fact that one is engaged in the busi-

ness of producing or buying, transporting and distributing natural gas should not alone eliminate him from competition from a new field of natural gas which might be discovered, produced, and sold to existing customers at a much cheaper rate, because of cost of production, proximity to the existing market, or a better grade of gas.

Therefore, the element of cost, although not necessarily of itself sufficient, is a very important one for the department to consider in determining whether the public convenience and necessity will be served.

Arkansas Louisiana Gas Co. v. Arkansas Department of Public Utilities.

Subsidiary Service Company Organization Disapproved As Unnecessary

A DECLARATION by Subsidiary Service Corporation, a wholly owned subsidiary of the trustee for Midland United Company, a registered holding company, under § 13 of the Holding Company Act, with respect to the organization and conduct of its business, failed to secure the approval of the Securities and Exchange Commission. A serious question was raised by the peculiar facts of the case, said the commission, as to whether the services rendered were for the benefit of associate companies. The record indicated that the services might well be primarily of benefit to the United itself in its apparent policy of liquidating these companies.

The subsidiary company had in earlier years purchased locomotives which it leased to an associate interurban railroad. In the latter part of 1938 it began to render accounting, secretarial, and clerical services at cost to United and some 13 associate companies. The holding company had caused its entire personnel, consisting of six persons, to be transferred to an approved subsidiary service company, and later it had caused four of these former employees to be transferred to the payroll of the declarant. These persons had formerly rendered accounting, secretarial, and clerical services to the holding company as employees. Services rendered to the holding company after the transfer consisted largely of gathering of data for routine reports and data in connection with the reorganization proceedings of the holding company, bookkeeping, stenography, and similar services. The commission said:

> It is apparent from the record that the activities of declarant are mainly those of the former "bookkeeping department" of United and that its present organization is solely for the purpose of having these activities conducted by declarant rather than by United. Except for the rendering of services to United and the 13 associate companies, declarant now has no other business. We fail to see the economy resulting from the performance of service contracts by United's former bookkeeping staff as a separate corporation with the attendant expenses in light of the circumstances of this case.
>
> It was testified that some of the 13 associate companies are either not wholly owned by United or the securities of these companies which are owned by United are pledged, and it was argued that partly for that reason the organization and conduct of business by declarant are necessary in order that the cost of the services rendered may properly be apportioned among the various companies rather than borne by United itself. However, as pointed out above, except for Indiana Hydro-Electric Power Company, all the associate companies are nonutility companies. Section 13 (a) of the act does not forbid a holding company to service its nonutility subsidiaries of the kind involved herein at a charge. There is, therefore, no merit to the argument that the separate organization and conduct of business by declarant are necessary. As to the servicing of Indiana Hydro-Electric Power Company, it does not appear to us that a company with the organization of declarant is necessary to render such servicing. The servicing of Indiana Hydro-Electric Power Company, if any servicing is necessary, can best be worked out as a separate matter.

Re Subsidiary Service Corp. (File No. 37-38, Release No. 2096).

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

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PUBLIC UTILITIES REPORTS

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS

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Rates, § 653.1 — Orders — Conditions — Waiver.

2. Suspension of final action and decision in a proceeding to secure a rate reduction, during the existence of abnormal world conditions, should be subject to conditions that a negotiated rate reduction be put into effect; that the Board retain complete jurisdiction; that statutory limitations affecting retention by the Board of jurisdiction be waived by the company and that the company by such waiver estop itself from raising any question of the effectiveness of the retained jurisdiction; that the company file with the Board monthly reports showing the effect of the reduction; that the company join with experts of the Board's staff in further study of rate simplification; and that the company file rates satisfactory to the Board effecting such reduction and an acceptance in writing of each of the conditions imposed, p. **2.**

[June 4, 1940.]

PROCEEDING *to determine whether existing electric rate schedules are just and reasonable; final action and decision suspended, subject to conditions.*

By the BOARD:

[1, 2] The Board, for reasons herein set forth, exercising the authority vested in it by law (R. S. 48: 2–21.1), has determined to suspend, and hereby does suspend, final action and decision in this proceeding.

Formal acceptance by the company of the conditions hereby prescribed is, however, a condition precedent to the going into effect of such suspension.

The Conditions

1. The company shall forthwith submit to the Board schedules of rates satisfactory to the Board effecting an aggregate annual reduction of at least $472,000 in electric rates. This reduction shall be in addition to the reductions effected during the progress of this proceeding, thus making a total of $730,000 in reductions, during the progress, and as the result of this proceeding initiated by the Board.

2. The Board retains complete jurisdiction of, and in, this proceeding to ascertain the effect of such reduction upon the company's electric revenue and for the purpose of taking such further action in the proceeding and without proceeding anew, as may, in the judgment of the Board, be required in the future.

3. That all statutory limitations affecting retention by the Board of jurisdiction as aforesaid shall be expressly waived by the company and that by such waiver the company estop itself from raising before the Board or in any court any question of the effectiveness of such retained jurisdiction because of any statutory limitations.

4. That the reduction be made effective with bills rendered on and after July 1, 1940.

5. That the company file with the Board monthly reports showing the effect of such reduction on its operating revenues and expenses, beginning one month after the effective date of the rate reduction hereby prescribed.

6. The classification of customers and the available schedules of rates have become complicated over the years. The company is required to join with the experts of the Board's staff in further study to achieve simplification of these rate schedules.

7. That the company file within ten days of the date hereof schedules of rates satisfactory to the Board effecting such reduction and an acceptance in writing of each and every of the terms and conditions herein set forth and as well written consent to retention of jurisdiction by the Board and waiver of objection because of any statutory limitations on jurisdiction.

The amount of the reduction hereby fixed has been reached by a series of negotiations with the company under the statute above cited, and the company has agreed to reduction in the prescribed amount, at this time and under presently existing conditions.

The Board has taken the indicated course, because it is apparent that any conclusion now reached by the Board as to value of property, operating expenses, and rate of return can have no assured stability for any reasonable period in the future. World conditions already have affected the financial markets and price levels; the continuation of the war and preparedness activities of the Federal govern-

ment, if past experience counts, will further affect such markets and price levels; the immediate future in its effect upon factors entering into rate making by order is highly uncertain. This uncertainty is indicated by the probability of increased Federal income and other taxes to finance national defense. Last World War conditions, even before our entry into the conflict, brought with them changing price levels to such an extent as to make the determining of fair value, operating costs, and fair rates impracticable through the process of formal proceedings, and the employing of such process had to be delayed until abnormal fluctuating economic conditions had again been replaced by conditions of some degree of stability.

The unsettling effect of the conditions which have arisen while hearings were conducted in the proceeding and since the close of the taking of testimony is apparent in a record made before the Board affecting the company. In recent months the company applied to the Board for approval of a plan for refunding its bonds. The effect of the plan would have been to reduce the company's funded debt. The Board, April 25, 1940, approved, with conditions and restrictions, the proposed refunding operation. It is now apparent, because of changed conditions affecting the financial markets, that the refunding operation cannot now be carried out on as advantageous terms as when originally proposed.

The Board also has taken into account the fact that the record of testimony and exhibits in the proceeding is extensive and that complete and detailed study and consideration of the record and the reaching of conclusions thereon and drafting such conclusions will consume a not inconsiderable length of time and that conclusions when reached may be subject to litigation.

The Board is satisfied, that the adjustment herein proposed respecting rate reduction and the course to be taken hereunder is in the public interest, all factors considered, and that the conditions hereby prescribed protect that interest.

SECURITIES AND EXCHANGE COMMISSION

Re Electric Bond & Share Company et al.

[File No. 59-3, Release No. 2020.]

Intercorporate relations, § 19.8 — Holding company simplification — Postponement of answer.

Postponement of the time for answering a notice and order instituting an integration proceeding under § 11(b) (1) of the Holding Company Act, 15 USCA § 79k, is not justified by the fact that there is pending a proceeding to determine whether other corporations are subsidiaries of the holding company which is a respondent in the integration proceeding.

[April 19, 1940.]

SECURITIES AND EXCHANGE COMMISSION

Application for postponement of integration proceeding under § 11(b) (1) of the Holding Company Act, 15 USCA § 79k; application denied and one week extension allowed for filing answer.

By the Commission: On February 28, 1940, the Commission issued its notice of and order for hearing under § 11 (b) (1) of the Public Utility Holding Company Act of 1935, 15 USCA § 79k, in the matter of Electric Bond and Share Company and its subsidiary companies. The respondent companies were required to file by April 6, 1940, their joint or several answers admitting, denying, or otherwise explaining their respective positions as to each of the allegations contained in the notice and order. It was also provided in the notice and order that the answers might include statements of the respondents' claims as to (a) the action which is necessary in order to limit the operations of each of the respondent registered holding companies to a single integrated public utility system, and (b) the extent to which any of such companies should be permitted to control additional integrated systems or to retain interests in other businesses.

On April 3, 1940, the respondents filed a joint application requesting postponement of the date for filing answers "until after final determination of the issues raised by" the pending application of American Gas and Electric Company pursuant to § 2 (a) (8) of the act, 15 USCA § 79b (a) for an order declaring that neither it nor its subsidiary companies are subsidiary companies of Electric Bond and Share Company, and requesting corresponding postponement of the hearing. On April 6, 1940, the Commission issued an order granting a 2-week postponement of the time for filing answers, and a corresponding postponement of the date of hearing, pending consideration of aforesaid joint application.

The principal arguments advanced in support of the joint application are (1) that the investment of Electric Bond and Share Company in the common stock of American Gas and Electric Company is a substantial fraction of its total assets and is the source of a substantial portion of its revenues, (2) that "the properties of the operating subsidiary companies of American Gas and Electric Company are either physically interconnected with or capable of interconnection with properties of other important operating companies in the Electric Bond and Share Company system and under normal conditions may be economically operated as a single interconnected and coördinated system with the properties of such other important operating companies," (3) that the first necessary step in formulating a program under § 11 (b) (1) *supra,* is to determine the physical relationship of the properties involved and (4) that such determination is impossible until the application of American Gas and Electric Company under § 2(a) (8) has been passed upon.

After careful consideration of the application for postponement the

Commission is unable to find that the reasons advanced are sufficient to warrant the requested delay in filing answers to the notice and order. We may pass over the obvious fact that the pendency of the application under § 2(a) (8), *supra,* cannot possibly create any difficulty in filing an answer "admitting, denying, or otherwise explaining their respective positions as to" the allegations of the notice and order, which is the only form of answer which any respondent is required to make. Assuming that the respondents desire to avail themselves of the opportunity to set forth voluntarily their own program of conformance with § 11 (b) (1), *supra,* it is still difficult to perceive how the status of American Gas and Electric Company could affect the ability of any of the several subholding company respondents to formulate their own programs.[1]

As to Electric Bond and Share Company itself, resolving every doubt in its favor, only a fraction of its properties can conceivably have any relationship to the American Gas properties for purposes of § 11 (b) (1), *supra.* There remains a vast group of properties requiring attention, and to which immediate consideration can be given, regardless of the status of American Gas and Electric Company. To take only a few examples, it is difficult to imagine how any disposition of the exemption application of American Gas and Electric Company could affect the problems which arise under § 11 (b) (1), *supra,* regarding the electric utility operations of the Bond and Share system in the state of Washington or the state of Texas, or its gas utility operations in Louisiana or Wisconsin, or its extensive utility and nonutility operations in various South American and Asiatic countries.

It is perhaps worthy of mention that Bond and Share, which now emphasizes the importance of its investment in American Gas and Electric Company, has never seen fit to join in the application for exemption, nor on the other hand to intervene for the purpose of supporting or opposing it.

The exemption application of American Gas and Electric Company will be set down for hearing as promptly as feasible after certain additional data requested from that company and from Electric Bond and Share Company have been furnished.

The application for postponement of the time for filing answers in the present case will be denied, except that a further one-week extension will be allowed. Such denial will be without prejudice to the filing of further application for reasonable postponement for good cause shown. The date of hearing will be postponed subject to further order of the Commission after examination of the answer or answers of respondents.

An appropriate order will issue. [Order omitted.]

[1] The notice and order for hearing expressly provided that American Gas and Electric Company should not be deemed a respondent unless and until so designated by further order of the Commission.

SECURITIES AND EXCHANGE COMMISSION

Re Electric Bond & Share Company et al.

[File No. 59-3, Release No. 2038.]

Intercorporate relations, § 19.8 — Holding company simplification — Postponement of answer.

Postponement of the time for answering a notice and order instituting an integration proceeding under § 11(b) (1) of the Holding Company Act, 15 USCA § 79k, should not be granted to allow respondents time to consider the problems raised, prepare data, and consider what answer should be made, when the only form of answer required is one admitting, denying, or otherwise explaining the respondents' position as to the allegations of the notice and order, not requiring extensive research, since the respondents may present an integration program at a subsequent stage of the proceedings and will be afforded adequate time to prepare supporting data.

[April 27, 1940.]

APPLICATION *for postponement of date for filing answers in integration proceeding pursuant to § 11(b) (1) of the Holding Company Act, 15 USCA § 79k; order of postponement denied and time for filing answers extended for one week. For decision on extension of time for filing answers, see ante, p. 3.*

By the COMMISSION: The notice of and order for hearing in this matter was issued on February 28, 1940, and provided for the filing of answers on or before April 6, 1940. On April 3rd the respondents filed a joint application requesting postponement of the date for filing answers "until after final determination of the issues raised by" the pending application of American Gas and Electric Company for an order declaring that neither it nor its subsidiary companies are subsidiary companies of Electric Bond and Share Company. This application for postponement was taken under advisement, and pending disposition thereof the date for filing answers was postponed from April 6 to April 20, 1940. On April 19, 1940, the Commission issued an order, ante, p. 3, extending the time for filing answers for an additional week, to April 27, 1940, but in all other respects denying the application for postponement filed on April 3rd. Such denial was "without prejudice to any further application for reasonable postponement for good cause shown." The order was accompanied by a memorandum opinion setting forth briefly the pertinent facts and considerations.

The respondents have subsequently filed, on April 26, 1940, a further application requesting postponement for an additional ninety days after April 27, 1940. The application recites, generally speaking, that the re-

spondents are separate corporate entities, with principal offices in various states; that they carry on a very extensive public utility business and certain nonutility operations both in the United States and in thirteen foreign countries; that they have begun to consider the problems raised by the notice and order and to assemble data preparatory to making answer; that in order to make answer to the 136 paragraphs of the notice and order it will be necessary for respondents' counsel to make further detailed inquiry of the respondents, to communicate with them by questionnaire or otherwise, and to study in detail their individual operations and also the interconnections now existing among them and between certain of them and certain companies which are not respondents; that it will then be necessary to prepare an answer on the basis of this material and to submit the answer to the individual respondents; that in addition to the factual material necessary to enable respondents to answer the allegations of the notice and order, it is necessary for respondents to consider the "extent to which it is possible or practicable to make response with respect to matters concerning which a response is permitted, although not required, by the terms of the notice and order," and that it is further necessary to determine the consequences that might result from filing of such a response; and, finally, that it is impracticable and impossible to complete "such answer" by April 27, 1940, or within any substantially shorter time than the period of extension requested.

The Commission has given careful attention to the application and is of the opinion that it does not set forth adequate grounds for the suggested delay. Accordingly, the application will be denied, but in order that respondents may not be in default a further one-week extension to May 4, 1940, will be allowed.

It is apparent from the notice and order that the only form of answer which the respondents are required to make is an answer "admitting, denying, or otherwise explaining their respective positions as to" the allegations of the notice and order. These allegations are 136 in number. The first 135 allegations merely state, in quite general terms, the identity of the respondents, their parent-subsidiary relationships under the statute, the types of business engaged in, and other similarly uncontroversial matters. If any erroneous statements of fact have been made, a brief scrutiny of records in the New York offices of the system would unquestionably suffice to disclose the error.

Paragraph 136 of the notice and order is a general allegation that it appears to the Commission that "the holding company system of said Electric Bond and Share Company is not confined in its operations to those of a single integrated public utility system within the meaning of the act, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public utility system." Whether respondents choose to admit, deny, or otherwise explain their position regarding this allegation, we are unable to perceive the need for the type of extensive research which is described in the application for delay.

Such research may be necessary in the preparation of evidence for purposes of hearing, but the only immediate problem is to file a simple answer admitting or denying or taking any other position in regard to this and other allegations of the notice and order.

The notice and order further provides that respondents may, at their option, include in their answer a statement of their claims or proposals as to the issues arising under § 11 (b) (1), 15 USCA § 79k. The present application refers to these provisions but contains no indication that respondents propose to exercise the option of filing this type of answer. There is merely a statement as to the difficulty of deciding whether, and in what manner, the option should be exercised.

Under these circumstances and in view of the extensions of time previously granted, no further substantial delay in the filing of answers seems appropriate. Respondents will have ample opportunity to present their own voluntary programs at any subsequent stage of the proceedings, and will be afforded adequate time to prepare supporting data for purposes of the hearing. In the absence of any intent to formulate and present any such program at the present time, there appears to be no occasion for further delay in the progress of the proceedings.

An appropriate order will issue.

By the Commission, Commissioner Henderson being absent and not participating.

FEDERAL POWER COMMISSION

Re Mississippi River Fuel Corporation

[Opinion No. 46, Docket No. G-150.]

Public utilities, § 49 — Natural gas business — Industrial and wholesale service.

1. A company purchasing natural gas and selling the gas directly to industrials and to distributing companies for resale for general public consumption is engaged in a business affected with a public interest subject to regulation for the protection of the public, p. 11.

Commissions, § 30 — Jurisdiction — Validity of statute.

2. The Federal Power Commission will not question a legislative declaration as to the public interest in natural gas regulation as contained in the Natural Gas Act, nor will it attempt to pass upon the act's constitutionality, p. 13.

Public utilities, § 21 —Tests of status — Charter provisions.

3. Charter provisions are not determinative of the status of a company as a public utility; the real test of the application of Federal regulatory power is not what a corporation is authorized to do or what its charter forbids it to do, but what it, in fact, does, p. 13.

RE MISSISSIPPI RIVER FUEL CORP.

Rates, § 13.1 — Powers of Federal Commission — Effect of contract.

4. The Federal Power Commission has jurisdiction under the Natural Gas Act to regulate the price of natural gas notwithstanding prices fixed by contracts entered into before the act became law, p. 13.

Rates, § 234 — What constitutes schedule or change — Contract rates — Natural Gas Act.

5. Proposed increased rates and charges in excess of those fixed by contracts for the sale of natural gas constitute a "change" in rates and charges and a "new schedule" within the meaning of § 4 of the Natural Gas Act, 15 USCA § 717c, even though the increased rates and charges proposed were prescribed pursuant to an agreement between the gas company and the gas purchaser, p. 14.

Gas, § 2.1 — Jurisdiction of Federal Commission — Natural gas to be mixed.

6. The Federal Power Commission has jurisdiction over the sale of natural gas under the provisions of the Natural Gas Act even though the natural gas is to be mixed by the distributing company with artificial gas for sale to customers, p. 14.

Rates, § 186 — Reasonableness —Burden of proof.

7. The Natural Gas Act plainly places on a gas company the burden of justifying increased rates and charges proposed, p. 16.

Rates, § 187 — Reasonableness — Burden of proof — Discharging the burden.

8. Evidence to justify the reasonableness of proposed increased rates and charges must be affirmative, concrete, and persuasive in order to discharge the burden of proof resting upon the proponent of such increased rates and charges, p. 16.

[May 31, 1940.]

PROCEEDING *initiated on motion of Federal Power Commission, under § 4 of the Natural Gas Act, 15 USCA § 717c, involving suspension of proposed increased rates and charges of an interstate natural gas company; jurisdiction sustained and increased rates and charges ordered not to become effective.*

APPEARANCES: Sullivan, Reeder, Finley & Gaines by Frank Sullivan and Hugh H. Sullivan, and William A. Dougherty, for the Mississippi River Fuel Corporation; Charles M. Spence and Robert W. Otto, for The Laclede Gas Light Company; James H. Linton, for the Public Service Commission of Missouri; Richard J. Connor, Assistant General Counsel, Edward H. Lange, and W. Russell Gorman, for the Commission.

By the COMMISSION: This proceeding was initiated on December 28, 1939, by the Commission, upon its own motion, under § 4 of the Natural Gas Act.[1] It involves the suspension of the proposed increased rates and charges[2] of the Mississippi River Fuel Corporation,[3] for the sale in interstate

[1] 15 USCA § 717c.

[2] Respondent's Rate Schedule FPC No. 1 and certain Supplements thereto, particularly Supplement No. 1 to Supplement No. 5.

[3] Hereinafter referred to as "respondent."

commerce of natural gas to the Laclede Gas Light Company, intervener herein.[4]

Respondent is a Delaware corporation authorized to do business in the states of Louisiana, Missouri, and Illinois. It produces no natural gas, but purchases its requirements in the state of Louisiana and transports that natural gas through its pipe line out of the state of Louisiana, into and through the states of Arkansas, Missouri, and into Illinois, and sells such gas to industrial users at wholesale and to distributing companies for resale for general public consumption in the aforesaid states.

Laclede is a Missouri corporation engaged in the retail distribution of a mixture of natural and artificial gas for general public consumption by domestic, commercial, and industrial users in the city of St. Louis, Missouri, and is the exclusive distributor of gas for such consumption in the said city.

On October 23, 1931, respondent entered into a contract with Missouri Industrial Gas Company (which contract was subsequently assigned to Laclede), under the terms of which respondent sold natural gas to the said purchasing company, for resale for domestic, commercial, and industrial purposes in the city of St. Louis, Missouri. This contract is designated as Mississippi River Fuel Corporation Rate Schedule FPC No. 1 in the Commission's files. Thereafter respondent filed a supplement thereto designated as Supplement No. 5 to said Schedule FPC No. 1. On December 1, 1939, respondent filed with the Commission an instrument designated in the Commission's files as Supplement No. 1 to Supplement No. 5 to respondent's Rate Schedule FPC No. 1, stating that proposed increased rates and charges for natural gas purchased by Laclede from respondent as contained in said Rate Schedule FPC No. 1 and supplement thereto would become effective as of January 1, 1940.

By its order of December 28, 1939, the Commission suspended the proposed increased rates and charges for the sale of natural gas for resale for domestic or commercial consumption for a period of five months from and after January 1, 1940, and fixed March 4, 1940, as the date for a public hearing on the lawfulness of the proposed increased rates and charges sought by respondent.

On February 27, 1940, Laclede filed a petition challenging respondent's proposed increased rates and charges as being unjust and unreasonable, and praying that it be permitted to intervene in this proceeding. On March 1, 1940, the Commission granted Laclede permission to intervene. Thereafter, the Commission, acting on request of respondent, postponed the date of hearing to April 3, 1940; and, pursuant to said order, a public hearing in this proceeding was had before a trial examiner commencing April 3, 1940, and concluding April 5, 1940.

After the hearing, briefs were filed and subsequent to the filing thereof, pursuant to the request of counsel for respondent, oral argument was had before the examiner.

[4] Hereinafter referred to as "Laclede."

Respondent's Contentions

Respondent contends that:

1. It was organized and has always operated as a private corporation; has dealt by private contract, only, with selected customers; has never held itself out to serve the public; has not exercised powers of eminent domain; and by reason thereof, has not dedicated its property to a public use; and that application of the Natural Gas Act to it, an allegedly private enterprise, would constitute a taking of property without due process or just compensation and in violation of the Fifth Amendment to the Constitution of the United States.

2. The sale of natural gas by respondent to Laclede is not a sale of natural gas subject to the rate regulatory jurisdiction of the Commission under the Natural Gas Act, for the reason that such natural gas is not sold by respondent to Laclede for resale for ultimate consumption, but is sold to and used by Laclede as an ingredient or constituent part of the gas which Laclede manufactures and which is mixed with the natural gas purchased by Laclede from respondent, and that the resulting gas is a different gas for resale; and that a "sale . . . for resale" means a sale of "natural gas" which is resold in identical composition;

3. The instrument filed with the Commission by respondent on December 1, 1939, is not a new schedule or change of rates or charges, as is contemplated under § 4 of the Natural Gas Act;

4. The "price" that is proposed to be made effective January 1, 1940 (and now under suspension) for natural gas sold by respondent to Laclede is just and reasonable.

For convenience, we have grouped our discussion of the issues in this matter in two categories, jurisdictional and substantive.

Jurisdictional Issues

[1] An examination of the record discloses that respondent owns and operates a 22-inch natural gas transmission pipe line extending in a northerly direction from a point in the state of Louisiana known as Perryville, near the Monroe Gas Field, through the states of Arkansas and Missouri, and into the state of Illinois. The line was constructed by respondent in the year 1929 and has been operated by it continuously since that time. Respondent's requirements of natural gas are purchased from affiliated companies in the field. Sales are made by respondent directly to industrials and to distributing companies for resale for general public consumption.

Under the provisions of its charter, extensive powers are granted respondent to engage in all operations usually incident to those of producing, transporting, and selling natural gas. Among other things, its charter provides "that nothing herein shall be construed to authorize the corporation to transport gas or oil for others as a carrier for hire, or to sell gas or oil for others as a carrier for hire, or to sell gas or oil except by special contract, or to constitute the corporation a common purchaser of gas or oil or a public utility corporation." It is the contention of respondent that its company was organized and its properties financed and constructed with the view of transporting and

selling natural gas *primarily* for industrial use, and that whatever sales have been made by it to distributing companies for general public consumption have constituted only so-called "nuisance" sales along the route of the pipe line.

The evidence discloses, however, that at the very outset of the financing and construction of the line respondent deviated materially from the alleged purpose of confining its operation to the service of selected industrial customers. In the public circular describing the proposed issue of mortgage securities for the construction of the line, the public is advised that, in addition to concluding contracts for the sale of gas to large industrial customers,

"Arrangements are being consummated with the Arkansas Power & Light Company—the Arkansas Natural Gas Company—and the Missouri Natural Gas Company, for sale of gas to these companies for distribution in communities along the route of the pipe line in the states of Louisiana, Arkansas, and Missouri."

Respondent, by contracts entered into with the Arkansas Power & Light Company, the Arkansas Natural Gas Company, and Missouri Natural Gas Company, agreed to supply these distributing companies with all their requirements for natural gas for distribution in approximately 30 cities and towns in the states of Arkansas and Missouri.

Moreover, under two of these contracts it obligated itself to construct the requisite branch lines from its main trunk pipe line to points near the city boundaries of the cities in which these distributing companies proposed to resell the gas for domestic, commercial, and other purposes. These contracts provide that preference be given the requirements of domestic consumers over industrial consumers, in the event of shortage of gas; that the distributing companies maintain every possible effort to increase sales of natural gas for house heating, cooking, and all other domestic uses; and domestic consumers are defined as including "private homes, boarding houses, apartment houses, hospitals, (and) charitable institutions."

The record further discloses that since the beginning of operation of the line in the latter part of 1929, under the terms of these contracts and supplements thereto, deliveries of natural gas to the above-named distributing companies for resale for general public consumption, in addition to a large number of industrial consumers, have been made continuously by respondent, and that since July, 1932, under the 1931 contract assigned to Laclede, deliveries of natural gas likewise have been made continuously by respondent to that company for resale and ultimate public consumption for domestic, commercial, and other uses.

The facts in the record obviously negative the assertion by the respondent that its business is a private one, unaffected with a public interest. Notwithstanding respondent's contention, the record discloses that it is dealing in and transporting natural gas, a business commonly known to be affected with a public interest and generally recognized to be subject to regulation for the protection of the public. Cf. Peoples Nat. Gas Co. v. Pennsylvania Pub. Service Commission, 270 US 550, 70

L ed 726, PUR1926D, 187, 46 S Ct 371; and State ex rel. Barrett v. Kansas Nat. Gas Co. 265 US 298, 307, 68 L ed 1027, PUR1924E, 78, 44 S Ct 544.

[2] The Congress has declared, under the provisions of § 1(a) of the Natural Gas Act, 15 USCA § 717, that the business of the respondent, to wit transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption, "is affected with a public interest" and that Federal regulation thereof "is necessary in the public interest." We will not question this legislative declaration contained in the Natural Gas Act nor, as we have indicated in an earlier opinion, attempt to pass upon the act's constitutionality, which respondent here questions. See Re Interchangeable Mileage Ticket Investigation (1923) 77 Inters Com Rep 200, 202; Maritime Asso. of Boston Chamber of Commerce v. Ann Arbor R. Co. (1925) 95 Inters Com Rep 539, 542; In Re East Ohio Gas Co. (Fed PC 1939) 28 PUR(NS) 129.

[3] In the light of the facts, respondent's contention that its charter provisions are determinative of its status likewise is untenable, for, in Terminal Taxicab Co. v. Kutz, 241 US 252, 60 L ed 984, PUR1916D, 972, 36 S Ct 583, Ann Cas 1916D, 765, the court held that the real test of the application of Federal power is *not* what a corporation is authorized to do, or what its charter forbids it to do, but what it, *in fact,* does. Contentions of a nature similar to those here asserted by respondent were refuted in the recent opinion of the Supreme Court in Nebbia v. New York (1934) 291 US 502, 78 L ed 940, 2 PUR(NS) 337, 54 S Ct 505, 89 ALR 1469. In that case the court flatly rejected an argument that the fixation of prices was valid only with respect to a business classically characterized as a public utility "in the accepted sense of the phrase."

[4] It is also urged by respondent that even if it is subject to the Natural Gas Act, its prices to Laclede are, under the Constitution of the United States as amended, immune from regulation because they are contained in contracts entered into before the act became law. Such contention, we believe, must be rejected, for the contrary has been so repeatedly held by the Supreme Court that the question is no longer open. That court, in Midland Realty Co. v. Kansas City Power & Light Co. (1937) 300 US 109, 81 L ed 540, 17 PUR(NS) 113, 115, 57 S Ct 345, held that there was no constitutional objection to the regulation by a state Public Service Commission of a contract establishing rates for the furnishing of steam for the heating of buildings by a power and light company, which contract was entered into prior to the passage of the Public Service Commission Law under which the rates were regulated. The Supreme Court said, on pages 113 and 114:

"These questions are to be decided upon the construction that the state supreme court put upon the statute. And that law is to be taken as if it declared that rates made in accordance with its provisions shall supersede all existing contract rates. There is here involved no question as to the validity of the rates prior to the passage of the statute. Without expression of opinion, we assume that then the parties

were bound by the contract. But the state has power to annul and supersede rates previously established by contract between utilities and their customers. It has power to require service at nondiscriminatory rates, to prohibit service at rates too low to yield the cost rightly attributable to it, and to require utilities to publish their rates and to adhere to them. Under the challenged statute, defendant had opportunity to support the contract rates and to test before the Commission and in the state supreme court—as others did—validity of the filed schedules. It failed to do so."

See Producers Transp. Co. v. California R. Commission, 251 US 228, 232, 64 L ed 239, PUR1920C, 574, 40 S Ct 131; Union Dry Goods Co. v. Georgia Pub. Service Corp. 248 US 372, 375, 63 L ed 309, PUR 1919C 60, 39 S Ct 117, 9 ALR 1420.

[5] The further contention is made by respondent that the instrument filed by it on December 1, 1939, and designated in our files as Supplement No. 1 to Supplement No. 5 to Mississippi River Fuel Corporation Rate Schedule FPC No. 1, does not constitute a change of rates and charges or a new schedule as is contemplated under § 4 of the Natural Gas Act, *supra,* because the increased rates and charges proposed by the said supplement were prescribed pursuant to the agreement between respondent and Laclede dated October 23, 1931, as amended. The Commission has the power, under § 4 of the Natural Gas Act, to suspend any "change" or "new schedule" of rates for a certain period pending hearing. The proposed increased rates and charges in this case represent a change from those now being charged and are new in that sense. Following the principle of Producers Transp. Co. v. California R. Commission, *supra,* and Midland Realty Co. v. Kansas City Power & Light Co. *supra,* that a prior contract cannot affect present regulation, we hold that the proposed increased rates and charges constitute a "change" in rates and charges and a "new schedule" within the meaning of § 4 of the Natural Gas Act.

[6] The provisions of the Natural Gas Act, respondent asserts, are inapplicable to its sale of natural gas to Laclede. Respondent does not contend that its sales to Laclede are not sales of "natural gas" within the meaning of the act or that they are not sales in interstate commerce. Such contentions would obviously be without foundation in fact, the evidence in the present record reveals. The gas sold by respondent to Laclede is admittedly natural gas, purchased and received by respondent in the state of Louisiana, transported therefrom by it through its transmission trunk line in a continuous and uninterrupted flow through the state of Arkansas and into the state of Missouri, where, near the city of St. Louis, sale and delivery are made to Laclede.

What respondent asserts, however, is that the act applies only to the sale of natural gas "for resale" and not to any other sale of gas; that Laclede mixes the gas it purchases with artificial gas; that the resulting gas is a different gas for resale; that, therefore, Laclede does not sell natural gas; and that, therefore, it does not purchase from respondent natural gas "for resale," the gas later resold not

being identical in composition with that originally purchased.

Let us examine the record concerning this matter. The facts are clear. After the natural gas is delivered by respondent to Laclede, that portion thereof purchased for the use of its domestic and commercial customers has been and is customarily and regularly mixed by Laclede with coke-oven gas and oil refinery gas. The natural gas and the refinery gas are mixed with the coke-oven gas for the purpose of enriching the latter, the natural gas constituting approximately 28 per cent of the whole volume of the mixture. The method of mixing the natural gas with the artificial gases is a mechanical, automatic process, consisting of bringing together the streams of coke-oven, oil refinery, and natural gas at different velocities, and running the combined stream continuously through a gas-mixing chamber or pipe. The natural gas does not come to rest in the course of such process, but flows continuously from the time Laclede receives it from respondent, until after it enters Laclede's delivery mains in the city of St. Louis for distribution and ultimate consumption by its domestic and commercial customers.

A fundamental defect in respondent's argument is that it ignores the definition by Congress in the Natural Gas Act, § 2(5), 15 USCA § 717a, (5), that:

"'Natural gas' means either natural gas unmixed, or any mixture of natural and artificial gas."

Thus, Congress has expressly declared, in terms which could hardly be more explicit, that, for the purposes of the act, natural gas and "any mixture of natural and artificial gas" are the same. Respondent suggests that the result of the mixing by Laclede of the natural gas and the other gases as described is to produce a "brand new gas," not a mixture within the legislative definition. The record shows that what respondent sells Laclede is admittedly natural gas, which itself is a mixture of a number of gases; and such natural gas is sold by it to Laclede "for resale," as the purchaser intends and does sell it after mixing it with artificial gas. What Laclede sells is, therefore, natural gas within the definition of the act, and it is a sale of natural gas "for resale" within the meaning of the act.

The application of the act to the transactions between respondent and Laclede, as disclosed by the record, is plain and there is no room for construction. Under respondent's views, if the mixture of natural and artificial gas were made by respondent *prior* to its sale to Laclede, the provisions of the act would be applicable, but since, in fact, the mixture takes place *after* the sale by respondent to Laclede, the regulatory powers of the Commission do not attach to such sale. If the views of respondent were accepted as to its construction of the said § 2(5) of the act, *supra,* a situation would result where neither this Commission nor any state Commission could regulate the sale of natural gas by respondent to Laclede. Rhode Island Pub. Utilities Commission v. Attleboro Steam & Electric Co. 273 US 83, 71 L ed 549, PUR 1927B, 348, 47 S Ct 294.

Congress did not intend such results, but rather that we have jurisdiction in the field from which states were

precluded. This intention is repeatedly expressed in the reports of the congressional committees that had under consideration the bill which was finally enacted as the Natural Gas Act. See also Church of the Holy Trinity v. United States (1892) 143 US 457, 463, 36 L ed 226, 12 S Ct 511, where the court said, "Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy." We, therefore, conclude that the contention here made by respondent must be rejected.

Substantive Issues

[7] The Natural Gas Act plainly places on respondent the burden of justifying the increased rates and charges here proposed. Section 4, 15 USCA § 717c (e), expressly provides that

"At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company. . . ."

In this proceeding respondent, although such evidence would, of course, be peculiarly within its knowledge, has wholly failed to adduce evidence of the character showing or tending to show that the proposed increased rates and charges to Laclede are just and reasonable. The record is barren of evidence showing or tending to show the amount of respondent's investment in, or the cost of its property used, useful, or necessary in connection with its operations involved in the sale of natural gas to said Laclede Gas Light Company, either at the currently effective or the proposed increased rates and charges, or to show the existing accrued depreciation in such property, its operating expenses and annual requirements for depreciation in such operations, or what would constitute a reasonable return on its property used, useful, or necessary in connection with its transportation and sale of natural gas to the Laclede Gas Light Company. Moreover, no contention or claim is made by respondent that it is not now earning a reasonable return on its investment in its property used, useful, or necessary in its operations here involved.

[8] Evidence to justify the reasonableness of the proposed increased rates and charges must be affirmative, concrete, and persuasive in order to discharge the burden of proof resting upon the proponent of such increased rates and charges. Re Rates on Plaster and Gypsum Rock (1913) 27 Inters Com Rep 67, 68; Re The Five Per Cent Case (1914) 31 Inters Com Rep 351. Upon the record in the instant case respondent has wholly failed to offer evidence showing the cost accruing to respondent attributable to its sales of natural gas to Laclede or the relationship between such costs and the revenues derived therefrom or the other similar matters which are factors to be considered in determining whether increased rates and charges are just and reasonable. These are facts susceptible of definite proof, and evidence relating thereto must be of that nature, Re Detroit Switching Charges (1913) 28 Inters Com Rep 494, 496. Respondent has utterly failed to offer such proof.

Upon the record, therefore, we conclude that the increased rates and charges for the sale of natural gas to the Laclede Gas Light Company for

resale for ultimate domestic or commercial consumption proposed by respondent, Mississippi River Fuel Corporation, to be made effective as of January 1, 1940, should not be or become effective.

Findings

Upon consideration of the order of suspension, the answer thereto by respondent, the petition requesting and the order granting permission to intervene, the evidence adduced at the public hearing, the briefs filed, and the oral argument presented, in the above-entitled matter, the Commission *finds* that:

1. On August 24, 1938, the Mississippi River Fuel Corporation filed with the Federal Power Commission its agreement, dated June 27, 1929, with the Missouri Industrial Gas Company (which agreement was subsequently assigned to the Laclede Gas Light Company), designated in the files of the Commission as Mississippi River Fuel Corporation Rate Schedule FPC No. 1, providing for the sale of natural gas by the Mississippi River Fuel Corporation to the Missouri Industrial Gas Company for resale for ultimate public consumption;

2. By the terms of the said agreement of June 27, 1929, it was to continue in effect for a period of ten years from and after the date upon which delivery of natural gas began, December, 1929, and has since been extended to and including July 31, 1947, by the provisions of Supplement No. 2 to said Mississippi River Fuel Corporation Rate Schedule FPC No. 1;

3. On December 1, 1939, the Mississippi River Fuel Corporation filed with the Commission an instrument designated in the Commission's files as Supplement No. 1 to Supplement No. 5 to Mississippi River Fuel Corporation Rate Schedule FPC No 1, providing that, in accordance with the terms of the agreement of June 27, 1929, as modified by supplement of November 22, 1935 (Supplement No. 5 to Mississippi River Fuel Corporation Rate Schedule No. 1), certain increased rates and charges for natural gas sold by Mississippi River Fuel Corporation to the Laclede Gas Light Company would become effective on January 1, 1940;

4. By order of December 28, 1939, the Commission, acting pursuant to the provisions of § 4 of the Natural Gas Act, entered upon a hearing concerning the lawfulness of the said increased rates and charges proposed by Mississippi River Fuel Corporation to be made effective as of January 1, 1940;

5. By said order of December 28, 1939, the Commission suspended the proposed increased rates and charges for the sale of natural gas for resale for ultimate public consumption for domestic or commercial use, which were proposed to be made effective on January 1, 1940, for a period of five months beyond January, 1940, unless the Commission should thereafter otherwise order;

6. Mississippi River Fuel Corporation is engaged in the business of purchasing natural gas in the natural gas fields located within the state of Louisiana, transporting the natural gas so purchased into the states of Arkansas, Missouri, and Illinois, and there selling a portion of such natural gas for resale for ultimate public con-

sumption for domestic, commercial, industrial, or other use;

7. One of the persons to whom Mississippi River Fuel Corporation sells such natural gas is the Laclede Gas Light Company, delivery being made at a point near the outskirts of the city of St. Louis, Missouri;

8. Under the provisions of § 4 (e) of the Natural Gas Act, *supra,* the burden of proof, at the hearing held in this matter, to show that the proposed increased rates or charges are just and reasonable is upon the respondent;

9. Respondent has failed to adduce evidence to show the amount of its investment in or the cost of its property used, useful, or necessary in connection with its operations involved in the sale of such natural gas to the Laclede Gas Light Company, either at the currently effective or the proposed increased rates and charges, or evidence to show the existing accrued depreciation in such property, its operating expenses, or its annual requirements for depreciation in such operations, or what would constitute a reasonable return on such property used, useful, or necessary in connection with its transportation and sale of natural gas to the Laclede Gas Light Company;

10. Respondent does not now contend or claim that it is not now earning a reasonable return on its investment in property used, useful, or necessary in its operations involved in the sale of such natural gas to said Laclede Gas Light Company;

11. Mississippi River Fuel Corporation is engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or other use;

12. The sale of natural gas by the Mississippi River Fuel Corporation to the Laclede Gas Light Company, pursuant to the provisions of Mississippi River Fuel Corporation Rate Schedule FPC No. 1 and the supplements thereto, is a sale in interstate commerce of natural gas for resale for ultimate public consumption within the meaning of the Natural Gas Act;

13. Mississippi River Fuel Corporation is a natural gas company within the meaning of the Natural Gas Act;

14. These provisions of Mississippi River Fuel Corporation Rate Schedule FPC No. 1, as modified by Supplement No. 5 and referred to in Supplement No. 1 to Supplement No. 5, filed by respondent, in so far as they provide for increased rates and charges proposed to be made effective as of January 1, 1940, constitute a change in rates and charges and a new schedule of such rates and charges within the meaning of § 4 of the Natural Gas Act, *supra;*

15. Mississippi River Fuel Corporation has failed to sustain the burden of proof imposed by said § 4 to show that the proposed increased rates and charges are just and reasonable.

An appropriate order will be entered in accordance with the opinion and findings.

CALIFORNIA APPELLATE DEPARTMENT, SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO

Alexander Riaboff

v.

Pacific Telephone & Telegraph Company

[Civ A 1324.]

(— Cal App(2d) —, 102 P(2d) 465.)

Public utilities, § 117 — Status of telephone company — Common carrier.

1. A telephone and telegraph company, although it may be a common carrier of messages which are entrusted to it for transmission and delivery, is not a common carrier as to the furnishing of facilities by which one person transmits to another messages by word of mouth, p. 20.

Service, § 434 — Telephone — Directories — Statutory obligation.

2. A telephone company does not, with respect to directory service contracted for, come within the provisions of § 2174, Civil Code, which provides that the obligations of a common carrier cannot be limited by general notice on its part but may be limited by special contracts; the preparation and delivery of such directory is in no way related to the business of transmitting and delivering messages entrusted to the company's care but is an established convenience and service for those of the public who use the facilities furnished for the transmission by themselves of their own messages, p. 20.

Telephones, § 1 — Company liability — Directory error — Service contract.

3. A rule of a telephone company limiting liability for errors or omissions in the listings of subscribers in the directory, when filed and in effect pursuant to the requirements of the Public Utilities Act, and referred to in a subscriber's application for service, becomes a part of a subscriber's contract both by reference and by operation of law and, in the absence of any showing that such rule is unreasonable, is binding upon the subscriber, p. 20.

[March 15, 1940.]

APPEAL *from judgment in favor of subscriber and against telephone company for damages because of erroneous spelling of name in telephone directory; judgment reversed with directions to enter judgment for plaintiff for amount as limited by company rule.*

APPEARANCES: Pillsbury, Madison & Sutro, of San Francisco, for appellant; George B. White, of San Francisco, for respondent.

PER CURIAM: In this action a judgment in the sum of $253.55 was awarded plaintiff by reason of the alleged negligence of the defendant Pa-

cific Telephone & Telegraph Company in erroneously spelling the name of the plaintiff in its telephone directory. Defendant does not deny the error but contends that by reason of its rule limiting liability for such error and the contract entered into for the service to plaintiff, the judgment should not be greater than $52.15.

[1–3] Respondent contends that defendant is a common carrier and therefore comes within the provisions of § 2174 of the Civil Code, which provides that "the obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract." This may be true, although we do not so decide, to a limited extent. In this state there is a total absence of authority on the point but if it be true, defendant is a common carrier only of messages which are entrusted to it for transmission and delivery. § 2168, Civil Code. It is upon this theory that the decision in Parks v. Alta California Teleg. Co. (1859) 13 Cal 422, 424, 73 Am Dec 589 (no longer authority in this state) rests, but as to the principal business of the defendant—the furnishing of facilities by which one person transmits to another messages by word of mouth, the great weight of opinion is that defendant is not a common carrier.

"The weight of authority is almost unanimous that telegraph and telephone companies, under the common law, are not common carriers." Jones, Telegraph and Telephone Companies, 2d Ed. pp. 24, 25 and numerous cases there cited.

The appellant is governed by and is required under the Public Utilities Act (1937 Deering Gen. Laws, Act 6386, § 14) to file schedule of "rates, tolls, . . . charges" etc., "to be collected or enforced, together with all rules, regulations, contracts, . . . charges," etc., "which in any manner affect or relate to rates, tolls, . . . or service." Concededly appellant complied with this requirement and among others was Rule and Regulation No. 14: "The company is liable for errors or omissions in the listings of its subscribers in the telephone directory in an amount not in excess of the charge for that exchange service during the effective life of the directory in which the error or omission is made."

The plaintiff made his application for service, which was accepted by the company on a printed form furnished by the company. The application contained the following language: "The Pacific Telephone & Telegraph Co. is requested to furnish the applicant, in accordance with its rates, rules and regulations on file with the Railroad Commission of the state of California, telephone service and facilities as detailed herein," etc.

The Rule No. 14, hereinabove stated, was on file and in effect at the time of the application.

We are of the opinion that the service contracted for by respondent does not come within the provisions of § 2174 of the Civil Code, *supra.* It is true that a telephone directory is "an essential instrumentality in connection with the peculiar service which a telephone company offers for the public benefit and convenience" (California Fireproof Storage Co. v. Brundige, 199 Cal 185, 188, PUR1926E 852, 854, 248 Pac 669, 670, 47 ALR 811),

but it is likewise true that the preparation and delivery of such directory is in no way related to the business of transmitting and delivering messages entrusted to its care but is an established convenience and service for those of the public who use the facilities furnished for the transmission by themselves of their own messages. As to these the company is not a common carrier, is charged in the preparation of its directory with the exercise of ordinary care, and is liable as a public service corporation for the breach of its contract to include its subscriber's name therein.

The rates charged for such service are governed and fixed by the Public Utilities Act, *supra*. They cannot be varied or departed from and are in part dependent upon appellant's rule of limitation of liability. When such service is contracted for, the rate so fixed by law represents "the whole duty and the whole liability of [appellant]" (Western U. Teleg. Co. v. Esteve Bros. & Co. (1921) 256 US 566, 572, 41 S Ct 584, 586, 65 L ed 1094) and "becomes a part of the contract, and the rights and liabilities under the contract must be determined with reference to the law in effect." Correll v. Ohio Bell Teleph. Co. (1939) — Ohio App —, 32 PUR(NS) 82, 84, 27 NE(2d) 173.

In our opinion appellant's rule fourteen (14) aforesaid became a part of respondent's contract both by reference and by operation of law and, in the absence of any showing that such rule was unreasonable, was binding upon respondent.

In view of this determination, it is unnecessary to consider other points presented by appellant.

The judgment is reversed, with directions to the trial court to enter judgment for plaintiff against defendant in the sum of $52.15, appellant to recover its costs.

Griffin, J.; Fritz, J., concur.

FEDERAL POWER COMMISSION

Re Safe Harbor Water Power Corporation

[Opinion No. 18-B, Project No. 1025.]

Valuation, § 300 — Materials and supplies — Original power project cost.

1. The cost of a licensed power company's materials and supplies that were moved to its permanent storeroom, as compared with the book value of the materials and supplies that had been carried into its temporary storeroom during construction of the former, will be allowed as actual legitimate original cost of materials and supplies only after such items as are properly allocable to operating expense have been deducted, p. 23.

Valuation, § 213 — Original cost determination — Land and quarry expenses — Future requirements.

2. The cost of land and other quarry expenses which were incurred by a licensed power company to obtain sufficient crushed stone near the project

to meet all requirements in the near and distant future are allowable as part of the actual legitimate original cost of the project when they would have been incurred regardless of whether or not additional stone for future requirements had been crushed, p. 23.

Valuation, § 213 — Original cost determination — Materials for future use.

3. Stone crushed for future additions to a power house near the site of a federally licensed power project should be disallowed, as not being part of the present constructed project as defined in § 3, subsection (11) of the Federal Power Act, 16 USCA § 796(11). 23.

Valuation, § 192 — Original cost — Fault locator — Relation to unowned facilities.

4. The cost of a power company's facilities for applying a fault locator does not constitute a part of the legitimate original cost of a power project where the transmission lines to which such facilities are connected are not owned by the power company and do not form a part of the project and the power company has no obligation with respect to their maintenance, p. 24.

Valuation, § 187 — Original cost — Repair work.

5. The removal by a power company of one waterproofing medium in favor of another type constitutes repair work rather than a fixed capital cost, since such work does not result in a substantial addition to the plant, p. 24.

Valuation, § 139 — Original cost — Interest during construction.

6. Interest during construction of a power plant retaining wall will not be allowed after the date when the wall became available for use, in determining the legitimate original cost of the power plant, p. 25.

Valuation, § 140 — Original cost — Interest during construction.

7. An allowance of 6 per cent was deemed reasonable for interest during construction of a power plant, in determining the legitimate original cost of such plant, p. 25.

[March 19, 1940.]

PROCEEDING *to determine actual legitimate original cost of a power project; finding in accordance with opinion.*

APPEARANCES: John E. Malone, and G. T. Hambright, for the licensee; Francis R. Bell, Milford Springer, and Reuben Goldberg, for the Commission.

By the COMMISSION: This is a proceeding under § 4, subsection (b) of the Federal Power Act, 16 USCA, § 797, to determine the actual legitimate original cost of the Safe Harbor Project, No. 1025—Pennsylvania, for the period January 1, 1933, to December 31, 1937.

In Opinions 18 and 18–A, this Commission found that $24,839,090.58 represented the actual legitimate original cost of the project as of December 31, 1932, and the books of licensee reflect that amount.

On March 7, 1938, Safe Harbor Water Power Corporation filed its Supplemental Claim No. 1 with this Commission, enumerating its claimed

actual legitimate original costs from January 1, 1933, to December 31, 1936. On August 20, 1938, licensee filed its Supplemental Claim No. 2 in which its claimed actual legitimate original costs for the calendar year 1937 were set forth. These claimed costs are the basis of this proceeding and they total $3,140,047.92 with a claim of $29,332.59 for retirements, or claimed net costs in the amount of $3,110,715.33 for the period from January 1, 1933, to December 31, 1937.

After appropriate public notice had been given, public hearings were held on September 11, 12, and 13, 1939. Upon a consideration of the order, the evidence adduced and the briefs filed in this proceeding, we are satisfied that licensee has proved project expenditures as actual legitimate original costs totaling $3,080,425.30 for the period from January 1, 1933, to December 31, 1937. The remainder of claimed costs amounting to $30,290.03 are not actual legitimate original costs and will be disallowed. That remainder includes $3,373.09 covering expenditures that were added to licensee's claimed cost through accounting errors, and during the hearing in this proceeding licensee conceded that such amount should be disallowed and excluded from the actual legitimate original cost of the project. The balance of the disallowed claimed costs in the sum of $26,916.94 will now be discussed.

Disallowed Claimed Costs
Materials and Supplies

[1] A temporary storeroom was established at the beginning of construction and functioned exclusively as a construction storeroom until June 30, 1932, when an inventory of all existing materials and supplies was made. After that date the temporary storeroom was used for the joint benefit of construction, operation, and maintenance purposes until December 31, 1935, when the permanent storeroom in the generating station was available. On December 31, 1935, materials and supplies which were suitable for the permanent operating storeroom were transferred from the temporary storeroom. The residue of materials and supplies carried in the temporary storeroom, which consisted of material no longer needed, was transferred to salvage operations for disposal. Licensee claimed $12,091.29 as the cost of this residue of materials and supplies. No physical inventory was made of the materials and supplies represented by this claimed cost. The claimed cost represents a residual amount resulting from a physical inventory of the materials and supplies that were moved to the permanent storeroom as compared with the book value of the materials and supplies that had been carried in the temporary storeroom. The evidence establishes that during the operation of the temporary storeroom for construction, operation, and maintenance purposes, materials and supplies in the amount of $564.87 were properly allocable to operating expense and, therefore, only the remainder of the claimed cost amounting to $11,526.42 will be allowed as actual legitimate original cost of materials and supplies.

Crushed Stone

[2, 3] To facilitate future addi-

tions to the power plant, licensee crushed sufficient stone near the project to meet all requirements in the near and distant future. Before the uses contemplated for the immediate future had been met, the entire amount of stone was charged to the Materials and Supplies Account to provide a record of the amounts used on Unit No. 2, the frequency converter and other project purposes. After all those project purposes had been fulfilled and there remained only the stone crushed for future additions to the power house, the sum of $30,443.53, representing the amount of money at which the remaining stone was carried in the Materials and Supplies Account, was transferred to the Electric Plant Account on June 30, 1936. The evidence establishes that there is included in licensee's claimed cost of $30,443.53 for crushed stone the cost of land and other quarry expenses which were incurred and would have been incurred regardless of whether or not the additional stone for future requirements had been crushed. These costs totaling $10,888.68 are allowable as part of the actual legitimate original cost of the present project. The remainder of the claimed cost in the amount of $19,554.85 is disallowed because it is not part of the present constructed project as defined in § 3, subsection (11) of the Federal Power Act, 16 USCA, § 796(11). No reflection is cast upon licensee's managerial judgment in crushing sufficient stone for future additions, and when that stone is used in the future and becomes a part of the project, the actual legitimate original cost of that stone will be considered in determining the cost of the project property of which it will be a component part.

Fault Locator Facilities

[4] Licensee made a claim for the cost of facilities for applying a fault locator in the amount of $889.30. These facilities consist of plug outlets with wire connections to the transmission lines owned by the Pennsylvania Water and Power Company. These plug outlets were installed in the Safe Harbor plant to provide for the use of the Pennsylvania Company's portable fault locator, which is a device used to locate defects in transmission lines without actually patrolling the lines. The transmission lines are not owned by licensee; it has no obligation with respect to their maintenance; and they do not form a part of licensee's project. No cost, therefore, incurred in connection with the fault locator has a proper place in the actual legitimate original cost of this hydroelectric project. The claimed cost of the facilities for applying the fault locator is disallowed.

Warm Air Discharge Pipes

[5] During 1935, the warm air discharge pipes located beneath the intake deck were closed with circular plates spot-welded to prevent the entrance of flood waters into the power house. In 1936 there was an unprecedented flood in the Susquehanna river. This flood caused licensee to place a sealing weld around those circular plates to make them water-tight. Licensee claimed $234.80 as the cost of this sealing weld. The removal of one waterproofing medium in favor of another type is classifiable as mainte-

nance or repair work, but not a fixed capital cost. In any event, this claimed cost must be disallowed as a capital cost because the work did not result in a substantial addition to the plant. Federal Power Commission Uniform System of Accounts Prescribed for Public Utilities and Licensees (1937) p. 49, 12c (1).

Interest during Construction

[6, 7] Licensee claimed interest during construction, for the period under review, in the amount of $215,-361.95. This claim includes $60,-848.26 of the $73,893.86 for interest during construction which was suspended by the Commission in Opinion No. 18–A because it was premature. The remainder of the $73,893.86 or $13,045.70 is the interest applicable to the investment in Unit No. 1 which was not completed by January 1, 1938. Also included in the total claim for interest during construction was the sum of $5,673.12 as interest on the cost of the retaining wall for the calendar years 1933 and 1934. In Opinion No. 18–A the Commission found that this retaining wall was a unit of property that was completed prior to December 31, 1932 and allowed $1,-918.07 as interest during construction on the investment in it. The Commission has stated the test for determining when interest during construction shall cease. In Re Clarion River Power Co. (1935) Opinion No. 19, 15 AR 285, at p. 299 the Commission declared that:

"What is sought is not the date of beginning commercial operation but rather the date upon which the property became available for use, as it is the latter date which marks the termination of the period during which interest and taxes and other items can be charged into the capital accounts of the project."

Since the retaining wall was available for use in 1932, more interest will not be allowed on it after that year. Licensee has claimed interest during construction at the rate of 6 per cent per annum. The evidence reveals that licensee's chief source of capital, for the period under consideration, was the sale of common stock. Six per cent is a reasonable rate of interest in this case. With respect to the balance of the claim for interest during construction in the sum of $209,688.83 the evidence shows that it is proper, so we allow it.

Conclusion

The Commission determines and finds that of the net claimed costs of $3,110,715.33 the actual legitimate original cost of project expenditures for the period from January 1, 1933, to December 31, 1937, is $3,080,-425.30, the disposition of the claimed net cost being shown in the following table by the Pennsylvania Public Service Commission Account Classification. The addition of these proved project expenditures to the actual legitimate original cost of the project of $24,839,090.58 heretofore determined by the Commission as of December 31, 1932, results in actual legitimate original cost of $27,919,515.88 for the project as of December 31, 1937:

Penna. P.S.C. Acc't. No.(A)	Account Classification	Licensee's Claimed Costs	Amounts Allowed	Amounts Disallowed
100	Relocation of C. & P. D. Branch, P. R. R.	$62,513.98	$62,513.98	
200	Organization	9,856.81	9,856.81	
203	Other Undistributed Fixed Capital	28.29	28.29	
216	Land in Fee	42,619.61	42,619.61	
218	Water Power Rights	41,582.74	38,582.74	$3,000.00
220	Dams, Reservoirs & Water Conduits	101,542.04	101,307.24	234.80
221	Power Plant Structures	315,021.97	295,467.12	19,554.85
222	Railroad Sidings & Trestles	17,943.95	17,943.95	
223	Turbines and Water Wheels	181,371.27	181,369.02	2.25
224	Electric Generators	758,379.58	758,379.58	
225	Other Electric Equipment	777,429.90	776,540.60	889.30
226	Other Power Plant Equipment	67,074.18	67,074.18	
239	Transmission Rights-of-Way	35.61	35.61	
241	Sub-Station Equipment	229,018.01	229,018.01	
279	Other General Structures	8,331.67	8,331.67	
280	General Office Equipment	12,418.01	12,418.01	
281	General Store Equipment	6,936.02	6,936.02	
282	General Shop Equipment	17,543.65	17,543.65	
284	General Garage Equipment	5,078.85	5,078.85	
285	General Laboratory Equipment	2,146.53	2,146.53	
286	General Tools & Implements	52,720.23	52,720.23	
287	Other General Equipment	115.21	115.21	
288	Engineering & Superintendence during Construction	375,245.21	375,245.21	
289	General Officers' & Clerks' Salaries during Construction	40,236.14	40,236.14	
290	General Officers' & Clerks' Expenses during Construction	469.10	469.10	
291	Office Supplies & Expenses during Construction	57,667.03	57,512.85	154.18
292	Law Expenditures during Construction	671.18	454.52	216.66
293	Injuries & Damages during Construction	*(.07)	*(.07)	
294	Insurance during Construction	32,080.75	32,080.75	
295	Taxes during Construction	535.83	535.83	
296	Interest during Construction	214,730.26	209,057.14	5,673.12
297	Other Expenditures during Construction	*(320,628.21)	*(321,193.08)	564.87
	Total	$3,110,715.33	$3,080,425.30	$30,290.03

(A) Pennsylvania State Public Service Commission account classification.
*( ) Denotes red figures.

An order will issue directing the result as herein found to be properly entered upon the books of licensee as fixed capital accounts and that the accounts shall be kept consistently with the order.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission

v.

Pittsburgh Railways Company

[Complaint Docket No. 11468.]

Rates, § 526 — Street railway — Fare zone — Extension.

1. The extension of a street railway fare zone would not be reasonable when any possible advantage accruing to residents of the area benefited could not equal or reasonably compensate for a large loss in revenue from such patrons, although public convenience can never be measured in dollars and mere proof of a loss in revenue will not of itself control, p. 29.

Rates, § 124 — Change of schedule — Commission duties — Factors considered.

2. The Commission in considering an application to change a rate schedule must consider possible benefits to the public and give due weight to adverse results for the utilities affected thereby, p. 29.

[March 25, 1940.]

RULE *to show cause why a street railway should not be ordered to extend first fare zone on one route; rule discharged.*

By the COMMISSION: This matter is a rule to show cause why Pittsburgh Railways Company should not be ordered to extend the first fare zone on Railways Company Route 56 from its limit at the intersection of Airport road and McKeesport boulevard, in the former borough of Hays, now part of the city of Pittsburgh, to Lincoln Place crossroad, in Lincoln Place, Allegheny county. Hearings have been held, and the case is now before us for disposition.

Route 56 extends from the downtown section of Pittsburgh through the Hazelwood and Glenwood sections of the city, crossing the Monongahela river by the Glenwood bridge, and further extending through the former borough of Hays, Lincoln Place, and the borough of Dravosburg to the city of McKeesport. There are three fare zones on Route 56; the fare in each zone being 10 cents cash. Three tokens may be purchased for 25 cents.

The outer limit of the first fare zone is now located at the intersection of Airport road and McKeesport boulevard in Hays; the inner limit being at the terminal of the route in downtown Pittsburgh. The first and second fare zones overlap; the inner limit of the second fare zone being located at the intersection of Hazelwood avenue and Second avenue, and the outer limit of the second fare zone at

a point known as Buttermilk Hollow, where Buttermilk Hollow is intersected by the McKeesport boulevard; consequently the overlap of zones extends from the intersection of Hazelwood avenue and Second avenue to the intersection of Airport road and McKeesport boulevard.

There is also an overlapping of the second and third fare zones. The inner limit of the third fare zone is located at Lincoln Place crossroad and the outer limit at the intersection of Sinclair street and Fifth avenue, McKeesport.

In each zone a 50-cent weekly school pass is available to school children, and a weekly unlimited pass at a one dollar rate may be obtained for passage between any two points in the third fare zone.

From the above statement, it appears that the suggested extension of the first fare zone limit to Lincoln Place crossroad will not only reduce fares from Lincoln Place crossroad to Pittsburgh, but will involve a reduction of one fare to all passengers between Pittsburgh and any point from McKeesport to the present first fare zone limit. The undisputed testimony is that the total annual loss in gross revenue by reason of the fare zone extension would approximate $34,800, of which about $11,000 would apply to Lincoln Place traffic. This estimate did not take into account possible stimulation in patronage.

The only possible stimulation of traffic from McKeesport would be traffic from that city to Pittsburgh. The Baltimore and Ohio Railroad operates on a schedule of from twenty-five to thirty-eight minutes between Pittsburgh and McKeesport, whereas the street railway running time between the Baltimore and Ohio Railroad Company station in McKeesport and the city of Pittsburgh is approximately fifty-five minutes. The commutation rate on the railroad between McKeesport and Pittsburgh is less than the rate which would be in effect if the proposed change in fare limits on Street Railway Route 56 were made.

The rates charged by the Pittsburgh and Lake Erie Railroad Company between McKeesport and Pittsburgh are the same as those charged by the Baltimore and Ohio Railroad Company. The borough of Dravosburg is served by the Pennsylvania Railroad Company. Dravosburg is located directly across the Monongahela river from the city of McKeesport, and the major part of shopping or amusement traffic likely travels between Dravosburg and McKeesport rather than between Dravosburg and Pittsburgh.

The Lincoln Place district, according to the 1930 United States census, had a population of approximately 2,800 and no considerable development has arisen since that time. An actual check of the houses in the area—a district extending from Buttermilk Hollow on both sides of the McKeesport-Pittsburgh boulevard and both sides of the street car line, to the Lincoln Place crossroad, and from that point on both sides of the street car line to Airport road—discloses 664 houses.

School children in the Lincoln Place area now have their transportation paid by the Pittsburgh Board of Education, but, if the first fare zone were extended, transportation would not be furnished free.

There are a certain number of people who walk approximately one mile from Lincoln Place crossroad to Airport road, possibly to save the extra fare. In an 18-hour period between 6 A. M. and 12 midnight, a total of thirty-six pedestrians boarded or descended from cars at the present fare limit at Airport road, walking to or from the cars upon the road leading to Lincoln Place.

[1, 2] The highway between the Airport road stop in Hays and Lincoln Place Crossroad is 18 feet in width and the record indicates that the traffic on the highway is so great as to render pedestrian travel dangerous. However, the testimony submitted in support of the extension of the fare zone was unsatisfactory in that apparently the witnesses, without exception, have free automobile transportation available and use it, for reasons of convenience or other reasons aside from the additional fare. After a careful review of the entire record, we are forced to the conclusion that respondent has sustained the burden of proof of showing that the extension of the inner or first fare zone on Route 56 of the Pittsburgh Railways Company to Lincoln Place crossroad would not be reasonable. Any possible advantage accruing to the residents of the Lincoln Place area could not equal nor reasonably compensate for the loss of some $11,000 in revenue from Lincoln Place patrons, and the loss of $34,800 over-all. Having reached this conclusion, we need not consider the contention of respondent that a contrary finding would confiscate its property.

We affirm the principles that public convenience can never be measured in dollars, and that mere proof of a loss in revenue will not of itself determine a proceeding such as that under consideration here. However, it is our duty not only to consider possible benefits to the public, but also to give due weight to adverse results for utilities under our control. Respondent is a bankrupt, and further reduction of its revenues by over $30,000 is a serious matter, although it would not be determinative if sufficient countervailing evidence of public convenience or safety appeared in the present record. Such evidence does not so appear and, therefore, we cannot find that Pittsburgh Railways Company should be ordered to extend the first fare zone on its Route 56 as contemplated by this rule; therefore,

Now, to wit, March 25, 1940, it is *ordered:*

1. That the instant rule be and is hereby discharged.

2. That the record in this proceeding be marked closed.

SOUTH CAROLINA SUPREME COURT

E. J. Miller et al.

v.

Central Carolina Telephone Company

[No. 15049.]

(— SC —, 8 SE(2d) 355.)

Public utilities, § 117 — Status of telephone company — Common carriers.

1. A telephone company is a common carrier of intelligence for hire, p. 31.

Discrimination, § 157 — Telephone company rates.

2. A telephone company has the duty to furnish service to all customers alike and to charge them uniform rates, and it has no right to discriminate against one subscriber as to rates or service or to give preferences or favors to others, p. 31.

Discrimination, § 50 — Special contracts — Rules and regulations.

3. Rules and regulations of the Commission adopted pursuant to law must be observed by telephone companies in order to bring about uniformity; to allow a company by carrying into effect a special contract and thereby to furnish to one subscriber service and to charge him rates which are not in accord with the general rules and regulations of the Commission would destroy the uniformity which the law demands and defeat the object intended, p. 31.

Discrimination, § 196 — Payment — Special contract — Liability for tolls.

4. A special contract whereby a telephone company agrees to charge a subscriber, in addition to local service rates, the regular rates for such long-distance calls as the subscriber himself may make or may expressly authorize others to make over his telephone and not to charge him for long-distance calls which are not expressly authorized by him is invalid and unenforceable as extending a special privilege, when the rules of the Commission make a subscriber responsible for all messages originating from or reversed to his telephone, p. 31.

Payment, § 33 — Service denial to enforce — Unpaid toll calls.

5. A telephone company has the right to discontinue telephone service upon the refusal of a subscriber to pay charges made for toll calls originating at his telephone, even though not authorized by him, where the rules and regulations of the Commission make him responsible for all calls, p. 31.

[March 28, 1940.]

JUDGMENT *for telephone subscriber in suit for damages for denial of service because of refusal to pay telephone toll charges on calls alleged to be unauthorized by subscriber; judgment reversed and cause remanded with directions to enter judgment in favor of telephone company.*

APPEARANCES: Thomas & Thomas, of Beaufort, and Knight & Arant, of Chesterfield, for appellant; James E. Leppard, of Chesterfield, for respondents.

E. H. HENDERSON, Acting Associate Justice: The plaintiffs, E. J. Miller and E. E. Miller, reside in the town of Jefferson, in Chesterfield county, where they operate a drug store. For several years prior to 1935 they had used, in their place of business, a telephone of the defendant, Central Carolina Telephone Company. Quite often customers of the store made use of plaintiffs' telephone for long-distance calls, and sometimes neglected to pay the drug store for them. The Millers were required by the company to pay for these calls, and as a result they had their telephone taken out on August 1, 1935.

Some time later the defendant discussed with the plaintiffs the question of resuming their telephone connection, and after conferences on the subject, the plaintiffs decided to have the telephone installed again.

[1–5] The application for service which the plaintiffs signed provided that plaintiffs agree "to pay established rates for all such service," and that "in making this application the undersigned agree to the rules and regulations of the telephone company as set forth in the exchange tariff."

A copy of the telephone directory of the Jefferson exchange was furnished the plaintiffs, and this had printed in it the following provisions: "Subscribers are responsible for all charges for messages originating from or reversed to their telephones." "The subscriber shall pay monthly in advance or on demand all charges for exchange service and equipment and shall pay on demand all charges for toll service. The subscriber assumes responsibility for all charges for exchange service and toll messages originating at the subscriber's station and for toll messages received at the subscriber's station on which the charges have been reversed with the consent of the person called." "In the event of abandonment of the station, the nonpayment of any sum or any other violation by the subscriber of the telephone company's rules and regulations applying to the subscriber's contracts or to the furnishing of service, the company may without notice either (a) suspend the service until all violations have ceased, or (b) terminate the subscriber's contract without the suspension of service, or (c) following a suspension of service, sever the connection and remove any of its equipment from the subscriber's premises."

Thereafter, the defendant presented bills to the plaintiffs for long-distance calls over the telephone which plaintiffs claimed were not authorized by them, and which they contended had wrongfully been charged to them, the bill amounting to $6.05.

The plaintiffs, claiming under a verbal contract with the company restricting their liability to long-distance calls actually made by them, or expressly authorized by them, refused to pay the bill. On August 15, 1936, the company gave plaintiffs notice that unless the bill was paid within four days, the telephone service would be discontinued, and such payment not being made the company disconnected the telephone on August 21, 1936.

This action was begun on October

31, 1936, in the court of common pleas for Chesterfield county, for actual and punitive damages, and was tried before his Honor, Judge Philip H. Stoll, and a jury, at the September, 1939, term of court.

At the trial, the plaintiffs offered evidence tending to show that just before the telephone service was reinstated in 1935 a verbal contract was made between the parties, whereby the company agreed to charge the plaintiffs, in addition to local service, the regular rates for such long-distance calls as the plaintiffs themselves should make, or should expressly authorize others to make over the telephone, and would not charge them for long-distance calls which were not expressly authorized by them. This evidence was admitted over the objection of the defendant.

Witnesses for the defendant denied that such a verbal contract was ever made.

At the conclusion of all of the evidence, the defendant moved the court for the direction of a verdict in its favor, on a number of grounds, but we shall confine our attention to the ones numbered 2, 3, 4, 5, 11, 12, and the last sentence of number 13, which are as follows:

"2. The rules and regulations under which this company is compelled to operate make the owner of a phone liable for the toll charges that go over that telephone.

"3. The company and the customer are bound by the rules and regulations made effective by the Public Service Commission and cannot make special and private agreements in conflict with the regulations.

"4. Under the rules and regulations of the Public Service Commission a subscriber is responsible for all messages originating from or reversed to his telephone.

"5. The rules and regulations by the Commission are made for the protection of the public as well as for the utilities, and, as such, are binding on both and cannot be changed or altered or abrogated except by the approval of the Commission."

"11. A telephone company is a utility or common carrier and as such is under the control of the Public Service Commission, and cannot make contracts as to the rates and types of service to be rendered except in accordance with such regulations and not contrary thereto.

"12. A utility must have uniform and reasonable rates and regulations.

"13. . . . Also if it were established that such contract as is alleged in this case was made, it would be void as being against public policy and contrary to the rules and regulations of the Public Service Commission under which this utility renders service and under which this and all other customers receive service."

This motion was refused by his Honor, the circuit judge, and after the arguments and the charge by the court, the jury found a verdict in favor of the plaintiff for $700 actual damages, and $800 punitive damages.

The defendant company has appealed to this court on thirty-eight exceptions, but we find it necessary to consider only the ones numbered 12, 13, 14, and 16. These are as follows:

"12. That the trial judge erred in refusing defendant's motion for a directed verdict, on the following ground, to wit: The error being that

a utility must have uniform and reasonable rates and regulations.

"13. That the trial judge erred in refusing defendant's motion for a directed verdict, on the following ground, to wit: The error being that the rules and regulations under which this company is compelled to operate make the owner of a telephone liable for the toll charges that go over the telephone. Under the rules and regulations of the Public Service Commission the plaintiffs are responsible for all messages originating from or reversed to their telephone.

"14. That the trial judge erred in refusing defendant's motion for a directed verdict, on the following ground, to wit: The error being that the company and the customer are bound by the rules and regulations made effective by the Public Service Commission, and cannot make special, restrictive, or private agreements in conflict with the regulations. The rules and regulations by the Commission are made for the protection of the public as well as for the utilities, and as such are binding on both, and cannot be changed or altered or abrogated except by the approval of the Commission."

"16. That the trial judge erred in refusing defendant's motion for a directed verdict, on the following ground, to wit: The error being that a telephone company is a utility, or common carrier, and as such is under control of the Public Service Commission, and cannot make contracts as to the rates and types of service to be rendered except in accordance with such regulations, and not contrary thereto."

On consideration of a motion for a directed verdict, the evidence, of course, must be viewed in the light most favorable to the plaintiffs, and so we shall assume that the contract was made.

The question, then, to be determined by the court is: May the parties make a valid contract, limiting and restricting the liability of the plaintiffs, as subscribers, and permitting them to refuse to pay for long-distance calls originating at their telephone when not expressly authorized by them, contrary to the rules and regulations of the Public Service Commission which make them responsible for all calls originating at their telephone?

The authority of the Public Service Commission over telephone companies and its power to adopt rules and regulations for the conduct of the business of such companies, is found in § 8289, of the Code of 1932.

"§ 8289. The Railroad Commission of this state shall have and exercise the same jurisdiction and supervisory powers and control over and concerning all telephone lines, stations, and exchanges in this state, and over all persons, firms, or corporations owning or operating such telephone lines, stations, or exchanges for the transmission of intelligence for hire, that it now has and exercises over and concerning railroads, telegraph, and express lines, and the persons, firms, or corporations owning or operating them in this state; and said Commission shall especially have the right and power and it shall be its duty to fix and regulate the rates or tolls to be charged by the owners or operators of all such telephone lines, stations, or exchanges, for the transmission of

intelligence for hire, . . . and also to make and enforce rules and regulations by which all persons, firms, or corporations, owning or operating telephone lines, stations, or exchanges in this state for the transmission of intelligence for hire, shall be governed in the conduct of said business. . . ."

The powers formerly exercised by the Railroad Commission are now conferred upon the Public Service Commission. Constitution of 1895, Art. 9, § 14, Acts of 1934, p. 1629; Acts of 1935, p. 25.

It will thus be seen that the Commission is granted far-reaching powers to make and enforce reasonable rules and regulations for telephone companies, with reference to the service furnished and the rates charged.

Acting under the power with which the general assembly has clothed it, the Public Service Commission has duly adopted and promulgated the following rules and regulations:

"10. The subscriber shall pay monthly in advance or on demand all charges for exchange service and equipment and shall pay on demand all charges for toll service. The subscriber assumes responsibility for all charges for exchange service and toll messages originating at the subscriber's station, and for toll messages received at the subscriber's station on which the charges have been reversed with the consent of the person called"

"12. In the event of abandonment of the station, the nonpayment of any sum due for exchange, toll, or other services or any other violation by the subscriber of the telephone company's rules and regulations applying to subscriber's contracts or to the furnishing of service, the company may without notice, either (a) suspend service until all violations have ceased, or (b) terminate the subscriber's contract without suspension of service, or (c) following a suspension of service, sever the connection and remove any of its equipment from the subscriber's premises."

A telephone company is a common carrier of intelligence for hire. Constitution of 1895, Art. 9, § 3; State ex rel. Gwynn v. Citizens' Teleph. Co. (1901) 61 SC 83, 39 SE 257, 55 LRA 139, 85 Am St Rep 870.

As such it has the duty to furnish service to all customers alike, and to charge them uniform rates therefor. It has no right to discriminate against one subscriber, as to rates or service, nor to give preferences or favors to others. State ex rel. Gwynn v. Citizens' Teleph. Co. *supra*.

To bring about such uniformity it is necessary that the rules and regulations of the Public Service Commission, adopted pursuant to law, be observed by telephone companies. To allow a company, by carrying into effect a special contract and thereby to furnish to one subscriber service, and to charge him rates, which are not in accord with the general rules and regulations of the Commission, would altogether destroy the uniformity which the law demands, and defeat the object intended. It would give to one subscriber a special privilege which is denied to others.

Discrimination by a telephone company is expressly prohibited by the Constitution.

"No discrimination in charges or facilities for transportation of the same classes of freight or passengers,

or for the transmission of intelligence within the state, or coming from or going to any other state, shall be made by any railroad or other transportation or transmission company between places or persons." Constitution of 1895, Art. 9, § 5.

The uniformity of service and rates required of telephone companies is quite similar to that which is enforced against railroad corporations. Discrimination by such companies is forbidden by § 8295, of the Code of 1932.

This court has said: "The parties had no right to agree, and could not make a valid agreement that it should be considered and treated as a carload lot of either or both, because the allowance by the court of such agreements would completely annul the statute prohibiting carriers, under heavy penalty, from making discriminations. . . . If shipper and carrier are allowed by agreement to vary classifications and call a commodity what it is not, the door is thrown wide open to all sorts of discriminations which are prohibited by the statutes." Byrd v. Atlantic Coast Line R. Co. (1916) 106 SC 1, 5, 90 SE 181, 182.

A similar rule is followed by the Federal courts in cases arising under the Interstate Commerce Act, 49 USCA § 1 et seq., and it is held that railroad companies are not at liberty, by private contract, to alter the terms of the service prescribed by the regulations of the Interstate Commerce Commission. Southern R. Co. v. Prescott (1916) 240 US 632, 60 L ed 836, 36 S Ct 469; Davis v. Henderson (1924) 266 US 92, 69 L ed 182, 45 S Ct 24; Chicago & A. R. Co. v. Kirby (1912) 225 US 155, 56 L ed 1033, 32 S Ct 648, Ann Cas 1914A 501.

The decisions of other states are to the same effect: Crawford County v. Bushmaier (1930) 182 Ark 175, 31 SW(2d) 144; Jackson & Crawford v. Chicago, B. & Q. R. Co. (1931) 213 Iowa 365, PUR1932C 68, 238 NW 912; Mollohan v. Atchison, T. & S. F. R. Co. 97 Kan 51, PUR1916C 537, 154 Pac 248, LRA 1918A 175; Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleph. Co. (1886) 66 Md 399, 7 Atl 809, 59 Am Rep 167.

We think that the case of Southern R. Co. v. Cumberland Teleph. & Teleg. Co. (1913) 127 Tenn 566, 156 SW 853, 45 LRA(NS) 990, Ann Cas 1914B 1187, relied upon by the respondent, is based upon a situation quite different from the present case, since in the Tennessee case there was no question of a rule of the company, nor a regulation of a Public Service Commission, requiring the subscriber to pay for all calls originating at his telephone.

Nor do we think that the facts in the case before us may properly be said to disclose a bona fide dispute as to the amount due on the plaintiffs' bill, under the rule as laid down in the case of Arnold v. Carolina Power & Light Co. 168 SC 163, PUR1933D 203, 167 SE 234, in view of the legal requirement here that the subscriber assumes responsibility for every call from his station. To so hold would amount to giving force and effect to a special contract which the parties had no right to make under the law.

The contract in the present case extended to the plaintiffs the privilege of refusing to pay for long-distance

calls originating at their telephone which they had not authorized; whereas all other subscribers were required to pay for such calls, whether authorized by them or not.

Our opinion, then, is that the special contract is invalid and unenforceable, as being contrary to the rules and regulations legally adopted by the Public Service Commission; and that the defendant had a right to discontinue the telephone service upon plaintiffs' refusal to pay the charges made.

It follows, we think, that his Honor, the circuit judge, erred in refusing to direct a verdict in favor of the defendant.

Accordingly, the judgment of the circuit court is reversed, and the cause is remanded to that court with directions to enter judgment in favor of the defendant under Rule 27 of this court.

Judgment reversed.

Bonham, C. J., and Carter and Fishburne, JJ., and J. Henry Johnson, A. A. J., concur.

SECURITIES AND EXCHANGE COMMISSION

Re West Penn Power Company

[File No. 32-196, Release No. 2009.]

Security issues, § 132 — Procedure — Exemption claim under Holding Company Act — Approved declaration.

1. The Securities and Exchange Commission, if it finds that proposed securities satisfy the requirements of § 7 of the Holding Company Act, 15 USCA § 79g, need not decide whether the declarant is entitled to an exemption of the securities under § 6(b), 15 USCA § 79f (b), where a registered holding company has filed an application pursuant to § 6(b) and subsequently by amendment filed under § 7, p. 49.

Security issues, § 95 — Stock or bonds — Capitalization ratio.

2. No adverse finding was made, under § 7(d) of the Holding Company Act, 15 USCA § 79g (d), as to a proposal to raise slightly more than half of the immediate capital requirements of a registered holding company through the issuance of common stock, where a financing program envisaging the raising of all the new capital requirements through the sale of senior securities would fall short of the statutory requirements of § 7(d) in view of the ability to sell junior securities and in view of capitalization ratios showing a comparatively small common stock equity, this smallness being further aggravated by the presence of inflationary items in the property and investment accounts, p. 49.

Security issues, § 95 — Common stock — Holding Company Act.

3. The purposes of Congress as set forth in the Holding Company Act are furthered to the extent that funds needed for expansion of a holding company's plant are being raised by the sale of common stock, because the increase of the common stock "cushion" is beneficial to the public interest

and to the interest of the holders of the company's publicly held bonds and preferred stock and because the sale of stock rather than bonds will aid in the economical and efficient operation of the company's business by avoiding rigidities resulting from adding interest to fixed charges, p. 49.

Security issues, § 118 — Conditions of approval — Prospectus.

4. An order permitting a public utility holding company to issue stock to finance the expansion of its plant imposed the condition that the holding company should incorporate into, or physically attach to, the prospectus issued in connection with the sale of the stock those parts of the Commission's findings and opinion appearing under the captions "Property and Investment Account," "Ratios to Property and Investment Accounts," and "Certain Adverse Factors," p. 50.

Security issues, § 115 — Financing expense — Fees and commissions.

5. No adverse finding under § 7(d) of the Holding Company Act, 15 USCA § 79g (d), was made with respect to fees and commissions on the sale of first mortgage bonds and common stock where the bonds would be sold with an underwriting spread of two points and the common stock would be offered to the public at $27 per share with an underwriting commission of $2 per share, the proposed spread of two points being broken down as follows: Manager's fee, ¼ on bonds and 25 cents on stock; underwriter's fee, ⅞ on bonds and 75 cents on stock; selling group fee, ⅞ on bonds and $1 on stock, p. 51.

Security issues, § 13.2 — Holding companies — Exemption from registration.

Discussion of the propriety of exempting from registration requirements under the Holding Company Act certain securities of a subsidiary of a registered holding company which is itself a registered holding company, p. 51.

(HEALY, Commissioner, concurs in separate opinion.)

[April 9, 1940.]

DECLARATION *pursuant to § 7 of Public Utility Holding Company Act, 15 USCA § 79g, with respect to issue and public sale of first mortgage bonds and shares of no-par common stock; declaration permitted to become effective subject to conditions.*

APPEARANCES: D. Bruce Mansfield and Leonard E. Ackermann of the Public Utilities Division of the Commission; Sullivan & Cromwell by Oliver B. Merrill, Jr., for West Penn Power Company; Seibert & Riggs by R. E. T. Riggs for W. C. Langley & Co., the First Boston Corporation, and Bonbright & Company, Incorporated; John J. Burns for W. C. Langley & Co.

By the COMMISSION: West Penn Power Company, incorporated in Pennsylvania, is a registered holding company and is also a subsidiary of American Water Works and Electric Company, a registered holding company. West Penn Power Company (hereinafter sometimes referred to as "West Penn") has filed a declaration pursuant to § 7 of the Public Utility Holding Company Act of

1935, 15 USCA § 79g with respect to the issue and sale publicly of $3,500,000 principal amount of first mortgage bonds, Series K, 3 per cent (due March 1, 1970) and 160,000 shares of no-par common stock.[1] The company proposes to use the net proceeds from the sale of such securities for the completion, construction, or acquisition of improvements, additions, and betterments to its plant and property.

West Penn has also filed a declaration pursuant to § 7 of the act, *supra,* with respect to certain changes in the rights of the outstanding common stock more fully discussed hereafter. Pursuant to appropriate notice a public hearing was held; no member of the public nor any representative of any state regulatory body appeared or requested an opportunity to be heard.

After having examined the record the Commission now makes the following findings:

While West Penn is a registered holding company, it is also a public utility company engaged in the production, distribution, and sale of electric energy in Pennsylvania.[2] The territory served includes many of the small industrial cities and towns in the general vicinity of Pittsburgh.

The principal subsidiary of West Penn is Monongahela West Penn Public Service Company, a West Virginia corporation, whose business is chiefly that of the production, distribution, and sale of electric energy. It also has various subsidiaries which, together with Monongahela West Penn Public Service Company (hereinafter sometimes referred to as "Monongahela"), operate in substantially all of the northern half of West Virginia and in portions of eastern Ohio, western Maryland, and western Virginia.[3]

The subsidiary and associated companies of West Penn, other than Monongahela and its subsidiaries, are engaged in coal mining and in power generation and transmission.[4]

Capitalization

The capital structure of the company including surplus before and

[1] West Penn Power Company originally filed an application pursuant to § 6 (b) of the Public Utility Holding Company Act of 1935, 15 USCA § 79f (b), for the exemption of the issue and sale of $5,000,000 principal amount of first mortgage bonds and 24,923 shares of 4½ per cent preferred stock. The Commission's staff raised the question as to whether a registered holding company, and thus West Penn Power Company, could qualify for such exemption. At the request of the applicant the Commission granted the privilege of oral argument on such question. Arguments were heard February 28, 1940. Since West Penn Power Company subsequently filed a declaration pursuant to § 7 of the act, *supra,* with respect to its amended financing program, and since as hereinafter appears we will permit such declaration to become effective, it is unnecessary for us to decide whether the company is entitled to the exemption pursuant to § 6 (b) of the act, *supra.*

[2] Operating revenues of the company in 1939 were $22,622,316, of which $22,438,791 was derived from the sale of electric energy.

[3] For the year 1939 consolidated operating revenues of Monongahela and its subsidiaries, amounting to $10,328,903, were derived approximately as follows:

Electric	84.1%
Gas	8.4%
Railways	6.3%
Miscellaneous	1.2%

[4] The subsidiary and associated companies of West Penn, other than Monongahela and its subsidiaries, are Allegheny Pittsburgh Coal Company, Beech Bottom Power Company, Inc., Ohio County Fuel Company, The Potomac Transmission Company, West Virginia Power and Transmission Company, West Penn West Virginia Water Power Company, Windsor Power House Coal Company, and Windsor Coal Company.

after the proposed financing as of December 31, 1939, is as follows:

Title of Issue	Actual, per Books Amount	%	Pro Forma Amount	%
Long-term Debt:				
First mortgage bonds,				
Series E, 5%, due 1963	$12,500,000	10.3	$12,500,000	9.7
Series I, 3½%, due 1966	27,000,000	22.2	27,000,000	21.0
Series J, 3¼%, due 1968	17,000,000	14.0	17,000,000	13.2
Series K, 3%, due 1970	None	...	3,500,000	2.7
Promissory notes (1½% to 3%, due in equal annual instalments on July 25, 1940 to 1946)	2,240,000	1.8	2,240,000	1.7
	$58,740,000	48.3	$62,240,000	48.3
Capital Stock and Surplus:				
4½% Preferred stock (par value $100 per share, cumulative)	29,707,700	24.5	29,707,700	23.1
Common stock (no par value)	27,750,000*	22.9	31,750,000†	24.6
Earned surplus [5]	5,190,801	4.3	5,190,801	4.0
Common stock and surplus‡	$32,940,801	27.2	$36,940,801	28.6
Total Capitalization and Surplus	$121,888,501	100.0	$128,888,501	100.0

Note: * 2,775,000 shares; † 2,935,000 shares.

‡ There appears on the balance sheet of West Penn an item of "Premiums and assessments on capital stock" in the amount of $437,746.71. This amount is not included in the surplus on the above capitalization schedule.

Securities Proposed to Be Offered Bonds

The first mortgage bonds, series K, 3 per cent, will be issued under an indenture from West Penn to the Equitable Trust Company of New York (succeeded by consolidation by The Chase National Bank of the city of New York) as trustee, dated March 1, 1916, as supplemented by a supplemental indenture.[6] The new bonds will be secured by the lien of the indenture ratably with the bonds presently outstanding.

The indenture provides that at the end of each calendar year so long as any bonds secured thereby remain outstanding the company shall credit to a depreciation reserve account an amount not to be less than a sum equal to 2 per cent of the average aggregate principal amount of bonds outstanding under the indenture during such year, such sums to be in addition to expenditures made by the company for repairs and renewals and that within twelve months from the expiration of such year the company shall spend the amount of such depreciation reserve for permanent improvements, extensions, and additions. No bonds may be issued under the indenture on account of any sums so expended. The indenture also provides that the company shall spend annually for maintenance and repairs a sum equal to 2½

[5] Under an order of the Pennsylvania Public Utility Commission the declarant in December, 1939, charged to earned surplus an amount of approximately $500,000 representing the balance of an unamortized commission and expense on the 6 per cent and 7 per cent cumulative preferred stock redeemed and is amortizing by charges to earned surplus under a 5-year period starting with July 1, 1939, an amount of approximately $2,300,000 representing cash premiums paid and cash adjustments made on the exchange and redemption of such 6 per cent and 7 per cent cumulative prerferred stock and commission and expense paid on the issuance of the 4½ per cent preferred stock.

[6] The supplemental indenture is to add certain new articles for the purpose of meeting the requirements of the Trust Indenture Act of 1939.

per cent of the average aggregate principal amount of bonds outstanding during such year. However, the company is entitled to be credited for such purpose with any amounts spent by it in the three previous years in excess of the sum total convenanted to be so spent, and further if at any time the amount so covenanted to be spent is in excess of the amount judiciously to be spent for that purpose, the unspent balance is to be invested in the construction or acquisition of permanent improvements, extensions, or additions against which no bonds may be issued.

The indenture contains no provisions requiring any annual amount for the satisfaction of any amortization, sinking fund, redemption, or retirement provisions for the bonds.

Stock

The new shares of common stock will have no-par value. The company will credit to capital the entire consideration received by it for the new shares of common stock to be sold. Every holder of the common stock is entitled to one vote per share. (The outstanding preferred stock is likewise entitled to one vote per share.) The voting power of the common stock with respect to the election of directors is subject to certain qualifications. If and when dividends on the preferred stock shall be in default in an amount equivalent to four full quarterly dividends and until all dividends then in default shall have been paid, the preferred stockholders shall be entitled, voting separately as a class, to elect two additional directors. If and when dividends on the preferred stock shall be in default in an amount equivalent to 12 full quarterly dividends, the preferred stock, voting separately as a class, shall be entitled to elect a majority of the board of directors. Such special rights of the preferred stock terminate when such default has been fully cured, subject to revestment in the event of any subsequent like default.

The holders of shares of the common stock will have the prior right, in proportion to the number of shares held by them, to purchase additional shares of common stock and securities convertible into common stock issued by the company upon original issuance and sold for cash at the price at which such stock or securities are to be sold as fixed at the time by the board of directors, and only within such period of time prescribed by the board of directors, but not less than fifteen days following the mailing to stockholders of notice of their right so to purchase such additional shares.

An order of this Commission, on July 18, 1939, permitting the declaration and application of West Penn with respect to the preferred stock now outstanding to become effective, contained a condition that so long as any shares of the 4½ per cent preferred stock are outstanding the company shall not, subject to further order of this Commission, pay any dividends on or make any other distributions to the holders of shares of its common stock, if after giving effect to such payment or distribution, the capital of the company represented by its common stock, together with its surplus, as then stated on its books of account, shall in the aggregate be less than $27,750,000.

The Proposed Changes in the Rights of the Outstanding Common Stock

The declaration filed with respect to the proposed changes in the rights of the outstanding common stock are principally concerned with the provision for preëmptive rights discussed above. The proposed amendment to the charter of the company will provide (a) that the corporation shall not amend, alter, change, or repeal any of the rights, privileges, terms, and conditions of the common stock in a manner prejudicial to the holders thereof without the consent of the holders of at least two-thirds of the total number of shares of the common stock then outstanding, and (b) that if such consent, if so required, has been obtained the corporation may amend, alter, change, or repeal any of the rights, privileges, terms, and conditions of the common stock upon the vote of the majority in interest of the stockholders entitled to vote thereon or, if then permitted by law, upon the vote of the holders of the majority of the total number shares of stock then outstanding and entitled to vote thereon.

Property and Investment Account

The property account (on a corporate basis) of West Penn as of December 31, 1939 (including construction work in progress of $1,734,909) was stated at $114,739,857 including intangibles, while depreciation reserve as of December 31, 1939, was stated at $16,100,570. Thus, the depreciated property account per books was $98,639,286.

The property account to a considerable extent is a result of acquisitions and/or mergers of properties and predecessor companies. The aggregate cost (based on cash paid or par values of securities issued) to West Penn, as determined from original records, of properties acquired by it from others exceeded by approximately $11,000,000 the amounts at which such properties were found to be recorded on the books of the vendors in those cases in which such books were available.[7] Of this amount $9,153,065 resulted from transactions between affiliates.

West Penn had adopted the requirements of the Uniform System of

[7] The amount of $11,000,000 is made up as follows:

Amount by which physical properties and securities acquired by West Penn Power Company upon its organization exceeded the amount at which such properties and securiteis were carried on the books of the affiliated constituent companies	$9,114,119
Less profits subsequently realized on the sale to nonaffiliated companies of certain properties acquired upon organization	514,945
Net excess	$8,599,174
Excess of purchase price of properties of Allegheny Valley Light Company (an affiliate) purchased from an affiliated interest over cost of such properties on books of affiliated vendor ..	553,891
Total affiliated	$9,153,065
Excess of purchase price of properties of Vandergrift Electric Light and Power Company (a nonaffiliated company) over estimated cost of such properties to vendor company	$185,978
Excess of cost of securities and properties of Keystone Light and Power Company and Keystone Power Corporation to a nonaffiliated vendor (affiliate sold at cost to it such securities and properties to declarant)	1,695,000
Total nonaffiliated	$1,880,978
Total	$11,034,043

Accounts prescribed by the Federal Power Commission (and substantially in the same form adopted by the Pennsylvania Public Utility Commission) effective January 1, 1937. In July, 1939, the company filed with the Pennsylvania Public Utility Commission and with the Federal Power Commission a report with respect to the "original cost" of its properties as of December 31, 1936. ("Original cost" is defined as "the cost of such property to the person first devoting it to public service.") The excess of book cost over "original cost" as shown by such report is $7,199,409, classified as "electric plant acquisition adjustments" of $12,189,467 and a credit to "electric plant adjustments" of $4,990,058. The results of the original cost studies have not been approved by either Commission.

Investments

As of December 31, 1939, investments and advances of West Penn were stated at $16,252,899. The company's principal investments consist of 583,999-23/25 shares of the common stock (74.5 per cent of the total outstanding) of Monongahela West Penn Public Service Company, which are carried at $7,000,019,[8] and the common stock of West Virginia Power and Transmission Company carried at $4,500,000.

Monongahela West Penn Public Service Company

The consolidated plant and property account, including intangibles of Monongahela as of December 31, 1939, is stated at $58,463,414 less reserves of $9,100,539. It is stated that the aggregate cost to Monongahela and its predecessors of properties acquired (in some cases from affiliated companies) exceeded by approximately $11,000,000 the amounts at which such properties were found to have been originally recorded on the books of the vendors. There is also included in the property and plant account the sum of approximately $2,000,000 representing the capitalization of bond discount and expense and commission and expense on the sale of capital stock.

The common stock and surplus of Monongahela amounts to $14,271,315. It is thus apparent that assetwise, taking into consideration the known intangibles in the property account of Monongahela, West Penn's investment is of questionable value. However, income available for common stock for the years 1937, 1938, and 1939 was $751,830, $484,106, and $885,489, respectively. Since West Penn holds approximately 74.5 per cent of the outstanding common stock, it is apparent that on an earnings basis its investment in Monongahela has substantial value.

Furthermore, the Pennsylvania Public Utility Commission, by order dated October 5, 1937, 20 PUR(NS) 435, authorized West Penn to retransfer its stock interest in Monongahela[9] to the West Penn Electric Company, a parent of West Penn, for a cash consideration of $7,000,000, plus an amount equivalent to 5 per cent simple interest computed from the date of

[8] West Penn does not consolidate Monongahela West Penn Public Service Company.

[9] Such stock interest was originally purchased by West Penn from the West Penn Electric Company, a parent, as of April 1, 1932, and proceedings concerning the validity of the acquisition had been pending before the Pennsylvania Commission.

original purchase to the date of retransfer, less dividends paid during such time by Monongahela to West Penn. The retransfer of such stock interest has not been consummated and there is no agreement with respect thereto.

West Virginia Power and Transmission Company

West Penn owns all of the common stock of West Virginia Power and Transmission Company, which latter company operates, under a lease, a hydroelectric generating station of West Penn at Lake Lynn, West Virginia, and also owns certain land and riparian rights. West Penn's investment in the stock of this company was purchased from an associate company and is stated at $4,500,000. The record indicates that the property originally going into the property account of this company was acquired by an associate company at a cost of $2,068,243. Thereafter the property was improved by the expenditure of $5,100,000 (advanced by West Penn). Total cost and improvement amounted therefore to $7,168,243. A portion of the property was then sold to West Penn for $6,500,000. West Penn subsequently purchased the stock. Assuming that the property thus transferred represents good value (and it was so testified to by an officer of West Penn) there remains in the investment account of West Penn an amount of about $3,830,000 representing appraisal revaluation and intercompany appreciation.

There appear to be no inflationary items in any of West Penn's other investments.

Ratios to Property and Investment Accounts

(*a*) *Corporate.* Upon consummation of the proposed financing and use of the proceeds, total debt will amount to 58.6 per cent of depreciated property and 50.8 per cent of depreciated property and investments. If the intercompany appreciation of $9,153,065, heretofore mentioned, is deducted from the depreciated property account, and $3,830,000 appraisal revaluation and intercompany appreciation is deducted from declarant's investment account, such percentages would become 64.2 per cent and 56.9 per cent respectively. Total debt and preferred stock on a pro forma basis will be equal to 75.1 per cent of depreciated property and investments and after giving effect to inflationary items will be equal to 84.0 per cent.

(*b*) *Consolidated.* The pro forma consolidated property account (Monongahela West Penn Public Service Company is not consolidated) will be $131,076,094 and reserve for renewals and retirements of $17,557,964—thus a depreciated property account of $113,518,130. Giving effect to the inflationary item, heretofore discussed, the adjusted consolidated depreciated property account would be $100,536,097. The investments in subsidiaries, not consolidated, are stated at $9,018,834. On a consolidated basis the total debt will amount to 54.8 per cent of depreciated property and 50.8 per cent of depreciated property and investments. If the inflationary items are deducted from the consolidated property account, such percentages would become 61.9 per cent and 56.8 per cent, respectively. Total debt and preferred stock will be equal to 75 per

cent of depreciated property and investments [10] and after giving effect to the inflationary items will be equal to 83.9 per cent.

On a pro forma corporate basis, based on the stated value and surplus, the common stock will have a value of approximately $12.60 per share. If deferred charges of $7,526,000 (representing unamortized debt discount and expense, redemption premium and expense on preferred stock and other miscellaneous charges) are deducted, the resulting adjusted value of the common stock will be approximately $10 per share. If the inflationary items are also deducted from the assets the adjusted value will be $5.60 per share.

Depreciation Policy

West Penn has not set up a reserve for depreciation based on an estimated life of physical property, but has adopted a policy of maintaining its plant and property in a state of operating efficiency and charging to operating expenses the cost of ordinary current repairs, renewals, and alterations. In addition, it is the practice of the company to provide by monthly charges to income a reserve for renewals and retirements. The Uniform System of Accounts requires the company to provide a reserve for depreciation of the electric plant owned, and in addition the Public Utility Law of Pennsylvania, enacted in 1937, provides that each public utility shall provide annual accruals for depreciation based on the average estimated life of depreciable property. West Penn is presently making studies with reference to such requirements. The declarant has stated that the extent to which compliance with such depreciation requirements will affect it cannot presently be determined, and pending such determination the company is continuing to provide a reserve for renewals and retirements as in previous years. For the year 1939 the declarant's provision for depreciation was equal to 62.9 per cent of the depreciation claimed for Federal income tax purposes. For the years 1938 and 1937 a similar comparison indicates percentages of 58.5 per cent and 55.5 per cent, respectively. The retirement reserve as of December 31, 1939, of $16,100,570 amounted to 14.1 per cent of the company's gross utility plant.

Rates and Earnings

The commercial vice president of declarant in charge of rates among other things testified that the residential rates of West Penn are the same throughout its territory and compare favorably with those of other large public utility companies including those operating in metropolitan areas in Pennsylvania. This is particularly true of rates charged to residential consumers who use from 40 kilowatt hours to 100 kilowatt hours per month. Such consumers amounted to about 47 per cent of the total residential consumers of West Penn. It was also testified that the commercial rates charged by the declarant compare favorably with those of other companies having similar service conditions.

During the three years from 1935 to 1937, inclusive, rates were voluntarily reduced by the estimated amount of $1,901,000.

[10] This does not give effect to the inflation in the property account of Monongahela.

On July 7, 1937, the Pennsylvania Public Utility Commission, stating that its information indicated that the rates and charges of the declarant produced an excessive rate of return, instituted on its own motion an inquiry and investigation for the purpose of determining the fairness, reasonableness, and justness of the rates and charges of West Penn, and ordered that the inquiry and investigation include consideration of the imposition of temporary rates. Public hearings were held beginning in April, 1938, and continued to January, 1939, and the matter is still pending. The declarant states that it is impossible to predict what, if any, reductions in rates will be made in the near future either through voluntary action or as a result of the above-mentioned proceeding instituted by the Pennsylvania Public Utility Commission.

No rate base has ever been established for the company. An officer of the declarant testified that the company was prepared to introduce into the rate proceedings engineering estimates and other evidence supporting the present rates and charges of the declarant on the basis of a rate of return comparable to that allowed by the Pennsylvania Public Utility Commission in other recent cases.

The earnings of declarant are subject to substantial fluctuations because of the extent of the company's dependency on the activity of its large customers situated around the Pittsburgh area who are engaged chiefly in the business of coal mining, iron and steel, and glass manufacturing. Approximately 46 per cent of West Penn's operating revenue in 1939 was traceable to its industrial customers, of which the aforementioned three classes of customers accounted for respectively 17 per cent, 13 per cent, and 5 per cent or an aggregate of 35 per cent. The past experience of the company indicates however, that its dependency on industrial customers is steadily becoming a less important factor because of a rapidly growing residential business. In 1920 revenues from industrial customers constituted over 70 per cent of total revenues of the company as against 10 per cent from the sale of energy to residential consumers. Currently, the industrial load accounts for less than 50 per cent of the total revenues of the company and residential sales for over 30 per cent.

The following tabulation reviews the company's experience of earnings in the past three years and indicates significant ratios with respect to the company's depreciation and maintenance charges, its ability to cover interest and preferred dividend requirements and to produce earnings for its common stock:

	1937 Per Books (000's)	%	1938 Per Books (000's)	%	1939 Per Books* (000's)	%
Operating revenues	$23,022	100.0	$20,848	100.0	$22,622	100.0
Operating expenses						
Operation	8,421	36.5	7,932	38.0	8,329	36.8
Taxes	2,580	11.2	1,937	9.3	2,650	11.7
Maintenance and repairs	1,856	8.1	1,616	7.8	1,684	7.4
Provisions for renewals and retirements	1,561	6.8	1,732	8.3	1,888	8.4
Total operating expenses and taxes	14,418	62.6	13,217	63.4	14,551	64.3
Operating income	8,604	37.4	7,629	36.6	8,071	35.7
Nonoperating income	630	2.7	292	1.4	414	1.8
Gross income	9,234	40.1	7,921	38.0	8,485	37.5
Deductions						
Interest on funded debt	1,970	8.6	2,023	9.7	2,137	9.5
Other deductions	305	1.3	389	1.9	305	1.3
Total	2,275	9.9	2,412	11.6	2,442	10.8
Net Income	6,959	30.2	5,509	26.4	6,043	26.7
Dividends on preferred stock	1,910	8.3	1,910	9.1	1,337*	5.9
Balance for common stock	5,049	21.9	3,599	17.3	4,706	20.8
Common stock dividends	4,607	20.0	3,524	16.9	4,329	19.1
Balance	$442	1.9	$75	0.4	$377	1.7
Times earned						
Interest on bonds	4.69		3.92		3.97	
Interest on bonds and other deductions	4.06		3.28		3.47	
Interest on bonds, other deductions and preferred dividends	2.21		1.83		2.25	
Earnings per share of common stock (2,775,000)	$1.81		$1.29		$1.70	
Dividends per share of common stock	$1.66		$1.27		$1.56	

* Based on 297,077 shares of 4½% preferred stock, par value $100 per share outstanding on December 31, 1939.

Giving effect to the proposed issuance and sale of the new bonds and the new common stock, but without making any allowance for earnings which might be obtained from the use of the proceeds of the sale of these securities, interest on bonds would have been earned in 1939 pro forma 3.81 times, interest on bonds and other deductions 3.33 times, and interest on bonds, other deductions and preferred dividends 2.18 times. Pro forma earnings per share of common stock (2,935,000 shares) would have been $1.57. This does not give effect to undeclared earnings on the Monongahela common stock. Such earnings amounted to 18 cents per share of West Penn's common stock.

Dividend Policy

Declarant has paid dividends on its common stock every year since its inception in 1916.[11] During the 1916-

[11]

Year	Net Income Available for Common Stock	Common Stock Dividends
1916	$818,087	$500,000
1917	558,938	600,000
1918	716,161	700,000
1919	822,967	800,000
1920	945,153	800,000
1921	1,328,681	1,832,000
1922	1,323,647	1,290,000
1923	2,005,143	1,185,000
1924	2,120,980	2,044,500
1925	2,453,269	2,256,000
1926	3,231,907	2,802,000
1927	4,076,497	3,278,135
1928	5,236,991	4,578,750
1929	6,792,268	5,550,000
1930	6,238,597	5,550,000
1931	5,834,136	5,550,000
1932	4,021,574	3,949,500
1933	4,409,893	4,319,750
1934	4,266,476	4,245,750
1935	4,531,506	5,827,500
1936	5,549,879	3,552,000
1937	5,048,512	4,606,500
1938	3,600,080	3,524,250
1939	4,483,323	4,329,000
Total	$80,414,665	$73,661,635

1939 period approximately 92 per cent of net income available for common stock has been declared out in cash dividends. A vice president and director of declarant and of American Water Works and Electric Company testified that "it has been the custom of the board to declare most of the earnings available for common stock in the shape of dividends each year." As to the future policy he testified that "I cannot speak for the board of directors but, obviously, unless we have some reason to build up our surplus we would, I imagine, keep on declaring more or less along the same line or following the same policy." In the last three years declarant's dividend payments were as follows:

	1937	1938	1939
Earnings per share of common stock (2,775,000 shares)	$1.81	$1.29	$1.70
Dividends per share of common stock	$1.66	$1.27	$1.56

Terms of Issuance

The proposed bonds and common stock will be offered for sale by a syndicate of eight underwriters headed by W. C. Langley & Co., First Boston Corporation and Bonbright & Company, Incorporated. The bonds will be sold to the public at a price of 104½ with an underwriting spread of two points. This represents a yield of 2.78 per cent to maturity, and cost to the company before expenses of 2.88 per cent. The First Boston Corporation and Bonbright & Company, Incorporated, propose to receive a manager's fee of ⅛ of a point each. It should be noted that W. C. Langley & Co., while acting as joint manager, will receive no compensation over and above the fee computed at the rate applicable to other underwriters on its participation of 5 per cent of the total offering. The reason for this was to preclude the necessity of a proceeding to determine whether or not "there is liable to be or to have been an absence of arm's-length bargaining" within the meaning of Rule U–12F–2 between West Penn Power Company and W. C. Langley & Co. It should be pointed out, however, that this Commission is expressing no opinion as to the relationship between West Penn Power Company and W. C. Langley & Co.

The common stock will be offered to the public at $27 per share with an underwriting commission of $2 per share. The First Boston Corporation and Bonbright & Company, Incorporated, propose to receive 12½ cents per share each as a manager's fee. The arrangement mentioned above, with respect to W. C. Langley & Co. in connection with the sale of the bonds applies also with respect to the sale of common stock.

The proposed spread of two points on the first mortgage bonds and commission of $2 per share on the common stock is broken down as follows:

	Bonds	Stock
Manager's fee	¼	$.25
Underwriter's fee	⅜	.75
Selling group fee	⅜	1.00
Total	2	$2.00

From the above fees, underwriters' expenses and transfer taxes will be deducted. It was testified that a spread of two points on bonds of a like character was normal and customary and that the only instance of a lower spread was in the recent issue of Dayton Power & Light Company where the spread was 1¾ points. It was stated that a higher spread was

justified in this instance because of the smallness of the issue.

In connection with the proposed $2 commission on the common stock, the commission was compared with that of other issues of common stock, both of utility companies and industrials. It was stated that there were only four issues of public utility common stocks offered recently. One was the Newport Electric Corporation which offered some 60,000 shares in May of 1939 at $29.50 with the commission of $2.50, or about 8.48 per cent. The North American Company offered 375,000 shares in December of 1938 where the commission was $1.30, but in that case there was no original issue and also no underwriting. The third issue mentioned was the recent offering of Indianapolis Power and Light Company on April 3, 1940, at a price of $24 with a commission of $2 per share or 8.33 per cent. The fourth instance was an offering by Washington Gas Light Company of 362,588 shares on August 3, 1939, at a price of $29.50 with a commission of $2 or 6.78 per cent. The examples of offerings by industrial companies showed that the commissions in most of such cases were higher on a percentage basis than is the proposed commission on West Penn stock which is 7.42 per cent.

While we are required to pass upon the reasonableness of fees and commissions, we are in a somewhat difficult position with respect to the proposed commission on the common stock because of the almost complete absence of common stock financing in the utility field. The proposed commission appears to be in line with those instances cited above. On the other hand the lack of comparable cases would seem to require a more complete analysis of proper commissions on common stock issues. While we will make no adverse finding in this respect, we do not feel that our decision in this respect should preclude a further analysis of this problem in general or that this decision should establish a precedent as to what constitutes a proper commission on common stock issues.

Price of the Common Stock

We have given considerable thought to the propriety of the price at which the common stock is to be offered to the public. Because all of the common stock presently outstanding is held by companies in the American Water Works system,[12] there is no market in such stock to give us an indication of what the stock would sell for on a free market. Representatives of the underwriters testified that the price for common stock shall be primarily related to the prospective earning power of the company and anticipated dividends from such earnings. On the basis of earnings for the year 1939 the proposed offering price of $27 per share amounts to 17.3[13] times earnings applicable to such stock for the same period.[14] A comparison of the proposed price of the common stock of

[12] Sixty-nine per cent held by The West Penn Electric Company and 31 per cent by West Penn Railways Company.

[13] On a pro forma basis, deducting the interest on the new $3,500,000 of bonds but without giving effect to increased earnings that may result from the employment of $7,500,000 of new capital.

[14] This does not give effect to the undistributed earnings of Monongahela West Penn Public Service Company. If all of such earnings were paid to West Penn in the form of

West Penn with other public utility stocks which are publicly outstanding and have a market indicated, with the exception of the common stock of Connecticut Light and Power Company and Philadelphia Electric Company, that the proposed price for West Penn stock is substantially higher on a times earnings basis than any of the other stocks.[15] On the other hand, instead of using figures for 1939 we compare the same prices on a 5-year average of earnings from 1935 to 1939, inclusive, it appears that of the seven stocks compared all but two have a ratio of current price per share earnings in excess of that of the proposed price for the West Penn stock.

Summary of Certain Adverse Factors

Apart from general factors which must be taken into account in any enterprise, there are certain special factors in this case which give rise to speculation. First, the Pennsylvania Public Utility Commission has instituted a rate proceeding. If this proceeding results in a substantial rate reduction, it may also substantially reduce West Penn's earnings. Secondly, the company's depreciation requirements may be increased under the system of depreciation accounting as required by the Uniform System of Accounts. Such increase would also reduce West Penn's earnings. Thirdly, in the results of the Original Cost Study filed with the Federal Power Commission and the Pennsylvania Public Utility Commission, West Penn has reported an amount of over $12,000,000 representing the excess of book value of property over the original cost thereof. If either the Federal Power Commission or the Pennsylvania Commission directs that this amount be amortized, it may have some effect on earnings and dividends. Moreover, neither Commission has approved nor disapproved the results of the original cost study. In addition there are problems of a similar nature in the case of some of the accounts of the company's subsidiaries.

Conclusions

[1–3] As indicated earlier in this opinion the company originally filed an application pursuant to § 6 (b) of the act, 15 USCA § 79f (b), and subsequently by amendment filed under § 7, 15 USCA § 79g. Since we find that the securities satisfy the requirements of § 7, it is unnecessary for us to decide whether the declarant is entitled to the § 6 (b) exemption. In applying the standards of § 7, we must consider the whole financing program, that is, both bonds and stocks.

The company represents, and there is no reason for doubting such representation, that it needs funds for the expansion of its plant. At the present time all of the common stock of West Penn is held by the American Water Works and Electric Company system. Furthermore, this Commission has declared by order [16] that the operating properties in the American Water Works holding company system meet

dividends, it would increase West Penn's earnings by 18 cents per share, making West Penn's total earnings per share amount to $1.75. There is no indication, however, that Monongahela will pay out all of its earnings in the form of dividends, and furthermore the effect of the inflationary items of $13,000,000 in the property account on future earnings is a matter of speculation.

[15] Without giving effect to undistributed earnings on the Monongahela stock.

[16] In Re American Water Works & Electric Co. Holding Company Act Release No. 949, 2 SEC 972.

the standards of physical integration provided in § 11 (b) (1) of the act, 15 USCA § 79k (b). To raise funds for normal expansion purposes it would seem that in such circumstances it would be appropriate for the holding company in the exercise of its holding company functions to contribute such necessary cash to its subsidiary. However, American Water Works is in no position to make such contribution, which demonstrates that the complex problems involved in the regulation of holding companies are not solved, even though the system as a whole meets the physical integration requirements of the Holding Company Act. West Penn, in these circumstances, is thus forced to raise cash for expansion purposes by a public offering of its securities. Conceivably new money can be raised by the issuance of first mortgage bonds, of preferred stock, or common stock, or by a combination of two or three of these methods. The capitalization ratios as already indicated in this opinion show a comparatively small common stock equity. This smallness is further aggravated by the presence of inflationary items in the property and investment accounts. Because of this fact, and in view of the ability to sell junior securities, we think that a financing program envisaging the raising of all the new capital requirements through the sale of senior securities would fall short of the statutory requirements of § 7 (d). Under the circumstances of this case as to the company's proposal to raise slightly more than half of its immedate capital requirements through the issuance of common stock, we make no adverse findings under § 7 (d) (1), 7 (d) (3), and 7 (d) (6).

To the extent that funds needed for plant expansion are being raised by the sale of common stock, the purposes of Congress as set forth in the act are furthered, because: First, the increase of the common stock "cushion" is beneficial to the public interest and to the interests of the holders of the company's publicly held bonds and preferred stock, and second, because of the sale of stock rather than bonds, to procure $4,000,000, will aid in the "economical and efficient operation" of the company's business since it will avoid the rigidities resulting from adding to fixed charges interest on that sum, rigidities of a kind which, as the Interstate Commerce Commission has frequently noted, have contributed largely to the present serious plight of the railroads.

The proposed bonds qualify under § 7 (c) (1) (B) because they will be secured by a first lien on the physical property of the declarant. The common stock qualifies under § 7 (c) (2) (b) because, as has already been pointed out, the stock is being issued for the purpose of financing the business of the declarant as a public utility company.

Section 7 (d) provides in substance that if the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration to become effective unless the Commission makes certain adverse findings with respect to the standards set forth therein. The Pennsylvania Public Utility Commission by its order dated April 8, 1940, has expressly approved the issue and sale of such securities. The requirement of subsection (g) is therefore satisfied.

[4] With respect to price the pri-

mary question is whether investors in the common stock will be adequately protected and the controlling factor in this connection is the reasonable prospect of earnings. While there are large write-ups in the property account, as has already been pointed out, there are no indications that they will induce such reductions in rates by the Pennsylvania Commission as to lead to severe inroads on future earnings available to the common stock. This Commission in making no adverse finding under § 7 (d), does not, of course, guarantee that there will be no such reductions in earnings or that the price will not, for such or other reasons, go below the proposed price to the public. While the registration statement and prospectus under the Securities Act contain statements of the facts so as to put purchasers on notice of the risks involved in the purchase of the common stock, in the interest of the proposed purchasers our order permitting the declaration to become effective will contain the condition that the declarant shall cause those parts of the Commission's findings and opinion in this proceeding appearing under the captions "Property and Investment Account," "Ratios to Property and Investment Accounts" and "Certain Adverse Factors" to be incorporated into or physically attached to the prospectus issued by West Penn Power Company in connection with the sale of such stock. In this connection it should be pointed out whether or not this case is decided under § 6 (b) or under § 7, we impose the same condition.

[5] As may be inferred from what we have already said, we make no adverse findings under § 7 (d) with respect to the fees and commissions.

In connection with the proposed changes in the rights of the outstanding common stock we do not find that they will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or are otherwise detrimental to the public interest or the interest of investors or consumers, and the requirement of § 7 (g) having been satisfied we make no adverse finding under § 7 (e) with respect to such proposed changes.

We will thus permit the declarations to become effective but our order will contain the condition heretofore noted as well as the following:

(1) That the transactions set forth in the declaration be carried out in all respects in accordance with and for the purposes represented thereby.

(2) That within ten days after the issue of the bonds and common stock and sale thereof, West Penn Power Company shall file with this Commission a certificate of notification showing that the transactions have been effected in accordance with the terms and conditions of and for the purposes represented by said declaration.

Commissioners Henderson and Mathews absent and not participating.

HEALY, Commissioner, concurring: I agree that West Penn Power Company may issue and sell $3,500,000 principal amount of first mortgage bonds and 160,000 shares of no-par common stock. But I am not clear that its declaration with regard to these securities should be permitted to become effective under § 7 of the Public Utility Holding Company Act; I

think that the issue and sale of these securities are exempted from the provisions of § 7 by virtue of the third sentence of § 6 (b) of the act.

I

On February 16, 1940, West Penn Power Company, which is a registered holding company and a subsidiary of a registered holding company (American Water Works and Electric Co. Inc.), filed an application pursuant to the third sentence of § 6 (b) for exemption from the provisions of § 6 (a) of the act with regard to the issue and sale of $5,000,000 principal amount of bonds and 24,923 shares of 4½ per cent $100 par value preferred stock. At the request of West Penn Power Company, the Commission heard arguments on the issue of whether a registered holding company which was itself a subsidiary of another registered holding company was entitled to an exemption in accordance with the provisions of the third sentence of § 6 (b) of the act. Before the Commission announced a formal opinion on this issue but after the company had been advised that the Commission was divided on the question, the company filed an amendment, which took the form of a declaration under § 7, for permission to issue $3,500,000 principal amount of first mortgage bonds and 160,000 shares of no-par common stock. It did not withdraw its application under § 6 (b) for an exemption from § 7.

If the filing of West Penn Power Company is to be treated as a declaration pursuant to § 7 of the act, I think that certain serious questions are present. They are due to the following facts:

(1) The balance sheet of West Penn Power Company contains large amounts of inflationary items;

(2) The proposed sale of the common stock to the public at $27 per share will result in "fattening" the present common stock, all of which is owned by the parent company; and

(3) The price at which the common stock is proposed to be sold to the public is equivalent to about seventeen times earnings of the common stock in 1939.

I shall discuss these issues in order.

The Inflationary Items

The property account of West Penn Power Company on a corporate basis is inflated in the amount of $11,034,043, of which $9,153,065 [17] results from intra-system transactions.[18] Deducting the intercompany appreciation of $9,153,065,[19] we find that the total debt ($62,240,000) is equal to 69.5 per cent of the net property ($89,486,221) and that the total debt and preferred stock ($91,947,700) are 102.7 per cent of the net property account. Whether in view of these ratios the issuance of the proposed securities could be permitted under § 7 is open to doubt. The maintenance of proper ratios as a prerequisite to the

[17] It is to be remembered that this figure makes no allowance for the fact that part of the cost to West Penn Power Company of properties acquired from affiliates is based on the par value of securities issued in payment therefor. The par value of securities issued to affiliated companies is obviously no fair criterion of value.

[18] See my dissenting opinion in Re Public Service Co. of Colorado, Holding Company Act Release No. 1701.

[19] I do not believe it necessary to deduct $1,880,978 representing excess cost of properties over cost to vendors for this amount arose in what apparently were arm's-length transactions.

approval of an issuance of securities is neither an innovation caused by the language of § 7 (d) nor by the Commission; contrariwise it has been the practice in utility financing for many years.[20]

It is pointed out in the majority opinion that the total debt and preferred stock on a pro forma basis will be equal to 84 per cent of depreciated property and investments less intra-system appreciation. This in itself is a strikingly high ratio and yet it does not tell the whole story, for the investment account contains substantial amounts of inflationary items over and above the $3,830,000 disclosed in the majority opinion in addition to the $9,153,065 intra-system appreciation included in West Penn's property account. To this must be added the inflation included in the company's investment in the common stock of Monongahela West Penn Public Service Company. This investment is now carried on West Penn's books at $7,000,019. The property account of Monongahela includes approximately $11,000,000 representing excess cost over cost to predecessors. The company claims to be unable to determine how much of this amount results from intra-system transactions, but believes that a substantial portion resulted from such transactions. But the company does admit that a sum of approximately $2,000,000 representing bond discount and expense, and commission and expense on the sale of capital stock,[21] has been capitalized and included in the property account of Monongahela.

Thus we find that the total inflation in the balance sheet of West Penn to be at least as follows:

Excess cost of property over cost to affiliates	$9,153,065
Investment in West Virginia Power and Transmission Company	3,830,000
Investment in Monongahela:	
Bond discount and expense	2,000,000
Property account	Substantial
Total (minimum)	$14,983,065

If this amount were deducted from the total net property and investment account, the ratio of debt to net property and investments less inflationary items would be 62.3 per cent, and the ratio of bonds and preferred stock would be 92.0 per cent.

"Fattening" of Presently Outstanding Common Stock

American Water Works and Electric Company[22] now owns all (2,775,000 shares) of the presently outstanding common stock of West Penn Power Company. This stock was acquired in a "basket" transaction and it is claimed that there is no way to ascertain accurately the cost of such stock to the parent company.

By realizing $25 per share on the 160,000 shares which it proposes to

[20] E. g., Re Consumers Gas Co. (Cal 1929) PUR1930C, 182; Re Commonwealth Electric Co. (NJ 1922) PUR1923A, 254; Re Millville Electric Co. (NJ 1920) PUR 1921A, 665; Ibid, PUR1930D, 278; Re New Hampshire Power Co. (NH) PUR1924B, 377; Re Tri-County Electric Co. (Mass 1937) 19 PUR (NS) 113; Re Independence Waterworks Co. (Mo) PUR1929E, 96; Re Public Service Co. (Mo) PUR1925C, 208; Re Northwestern Pub. Service Co. (Neb) PUR1926B, 585.

[21] The impropriety of this practice has already been noted in the Commission's opinion in In the Matter of Alleghany Corporation, Securities Exchange Act of 1934, Release No. 2423.

[22] American Water Works and Electric Company's § 11 (e) plan has been approved. See 2 SEC 972.

sell to the public,[23] West Penn will receive $4,000,000. On an asset basis per books the common stock is not worth $27 per share, or even $25 per share, but only $11.90 per share; and if inflationary items are deducted as indicated in the table below the value drops to as low as $3.75 per share. Thus the sale to the public of 160,000 shares at a price which will permit the company to realize $25 per share will "fatten" the book value of the presently outstanding shares—all of which are owned by the parent company—and will immediately dilute the value of the 160,000 shares being sold to the public. The table below is revealing:

Value	Actual	Pro Forma
Per books	$11.90	$12.60
Deducting:		
(1) Intercompany appreciation in property account ($9,153,065)	8.57	9.47
(2) Above plus deferred charges of $7,526,000	5.86	6.90
(3) (1) and (2) plus known inflation of $5,830,000 in investments account	3.75	4.92

Since each share of common stock will be increased on an asset basis from $3.75 per share to $4.92 per share, or $1.17 per share, the book value of the common stock owned by the parent company (2,775,000 shares) will be increased by $3,246,750, which is 81 per cent of the total amount to be contributed by the public for the new common stock.

The Price of the Common Stock

The West Penn stock is to be sold at $27 per share. In 1939 the common stock earnings on a pro forma basis were $1.57 per share. Thus the price of $27 is equal to about seventeen times earnings.[24] This is an unusually high figure. A rate case is now pending. What, if any, effect the determination thereof will have upon future earnings of West Penn we cannot ascertain. Nor can we determine the effect on earnings if and when the company complies with new requirements as to depreciation accounting.

II

However, because of the view I take as to the proper disposition of the filing before us, it is unnecessary to pass on any of the above three questions. It is important to realize that there is a significant difference between our authority under § 6 (b), 15 USCA § 79f (b), and under § 7, 15 USCA § 79g. According to § 6 (b) (so far as applicable) an exemption is given from § 7 where (1) the issuing company is a subsidiary of a registered holding company; (2) the issue and sale are solely for the purpose of financing the business of such company; and (3) the issue and sale have been expressly authorized by the state Commission of the state in which such subsidiary company is organized and doing business. Where these circumstances exist, we have no alternative but to exempt the issue and sale from the standards of § 7. True, we have authority to impose terms and conditions which are appropriate in the public interest or for the protection of investors or consumers. How-

[23] The sale price is $27 per share, but $2 per share is allocated to underwriting commissions.

[24] This is without giving effect to earnings to be expected from employing the additional capital to be raised. But this may be more than offset by the fact that the company must amortize certain deferred charges over a period of five years.

ever broad this power may be,[25] it was not intended that it be used to accomplish what might be accomplished if the securities were to be adjudged in light of the standards of § 7 and thus in form grant exemption and in substance deny it and also thereby ignore the rights of local regulatory bodies.[26]

As I have stated above, West Penn Power Company amended its original application so that in effect it filed a declaration pursuant to § 7. But I believe that where an exemption is available, we should give the company the benefit thereof irrespective of whether the company sought the applicable exemption. See separate opinion of Healy and Mathews, Commissioners, in Re Consumers Power Co. (1939, 1940) Holding Company Act Release No. 1854, 33 PUR(NS) 321. Thus I must determine whether West Penn Power Company is entitled to an exemption in accordance with the provisions of the third sentence of § 6 (b) of the act. I believe the conclusion is inescapable that it is so entitled.

The third sentence of § 6 (b) provides:

". . . The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the state Commission of the state in which such subsidiary company is organized and doing business, or if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company when such subsidiary company is not a holding company, a public utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company, or an investment company."

Thus, in determining whether an exemption may be granted we are confronted with three standards, namely:[27]

(1) The applicant must be a subsidiary company of a registered holding company;

(2) The securities in question must be issued and sold solely for the purpose of financing the business of the applicant company; and

(3) The issue and sale of the securities must be approved by the state Commission of the state in which the applicant is organized and doing business.

The second and third conditions are clearly satisfied, as is indicated in the majority opinion. Accordingly, I turn my attention to the first condition.

West Penn Power Company is a registered holding company and also a subsidiary of American Water

[25] See United States v. Lowden (1939) 308 US 225, 84 L ed —, 60 S Ct 248.

[26] Cf. Palmer v. Massachusetts (1939) 308 US 79, 84 L ed —, 31 PUR(NS) 242, 60 S Ct 34.

[27] I confine myself to the first clause of the quoted sentence because obviously the last part of the sentence is inapplicable for it applies only to subsidiary companies which are not holding companies or public utility companies among others.

Works and Electric Company, Incorporated, also a registered holding company. West Penn Power Company is incorporated under the laws of the state of Pennsylvania. It is engaged in the production, distribution, and sale of electric energy in Pennsylvania. It has various direct and indirect subsidiaries engaged in rendering utility services in Pennsylvania and adjacent states. Shortly after the enactment of the Public Utility Holding Company Act, West Penn Power Company applied under § 3 (a) (2) of the act for exemption as a holding company, on the ground that it was predominantly a public utility company whose operations as such did not extend beyond the state in which it was organized and states contiguous thereto. In an opinion and order entered November 8, 1939, Holding Company Act Release No. 1779, 32 PUR(NS) 47, the Commission found that the company was not predominantly a public utility company and accordingly denied the exemption sought. Shortly thereafter West Penn Power Company registered as a holding company.

There is no question that West Penn Power Company is a "subsidiary company" as defined in § 2 (a) (8), 15 USCA § 79b, of the act and that it is a "registered holding company" as that term is defined in § 2 (a) (12) of the act. Also, as the terms are defined in the act, it is a "public utility company," and "electric utility company," and a "holding company."

I am unable to agree with the contention that a subsidiary of a registered holding company which is itself not a registered holding company is entitled to the exemption granted by the third sentence of § 6 (b), but that a subsidiary of a registered holding company which itself is a registered holding company is not so entitled. I believe that where the phrase "subsidiary company," is preceded by the adjective "any" that an exemption is thereby granted to any company which is a subsidiary of a registered holding company irrespective of whether such company is or is not itself a registered holding company.

It is to be recognized that the act itself defines the terms used therein. The terms "electric utility company," "public utility company," "holding company," "registered holding company," and "subsidiary company," are so defined that there is an overlapping in the sense that any company may be one or many of the type of companies defined. Particularly, the fact that a company may be both a holding company and a public-utility company is expressly recognized in §§ 3 (a) (2) and 3 (a) (3), 15 USCA § 79c.

Throughout the act there are numerous instances where duties and responsibilities or prohibitions are imposed generally against registered holding companies and subsidiaries and from which they are granted partial exemptions under certain circumstances.[28] Exemptions, chiefly granted to subsidiaries, are most often qualified and limited in order to effect the desired purpose in a particular section. For example, in § 3 (a) (1) the term "subsidiary company" is expressly limited, so far as such section is concerned, to a subsidiary company "which is a public utility company." In the last clause of the third sentence of § 6 (b) the

[28] There are also sections of the act which limit exemptions to applicants "other than a registered holding company." See § 2 (a) (7) and § 3 (c).

term "subsidiary company" is expressly qualified so as to eliminate from the class exempted thereby "a holding company, a public utility company, an investment company, or a fiscal or financing agency of a holding company, a public-utility company, or an investment company." In § 7 (c) (2) exemption is granted from the standards of § 7 (c) (1) where, among other things, the issue or sale of the securities is for the purpose of financing the business of the declarant as "a public utility company" or where the declarant is "neither a holding company nor a public utility company." In § 9 (a) (2) of the act, 15 USCA § 79i, we find that an exemption from the provisions of § 9 (a) (1) is granted to the acquisition by "a public utility company" of securities of "a subsidiary public utility company thereof." Another example appears in § 10 (c) (2), 15 USCA § 79j, where additional tests must be applied by the Commission in approving an application for the acquisition of securities or utility assets if such securities or utility assets are those "of a public utility or holding company."

I think it obvious that the term "any subsidiary company of a registered holding company" as used in the first clause of the third sentence of § 6 (b) was intended to include a subsidiary company which is also a holding company. Particularly two things in this third sentence should be noted. First, that the exemption is granted to "any" subsidiary company which complies with the other conditions of the section. This is used as distinguished from the language found elsewhere in the act where reference is made to "a" subsidiary.[29] Secondly, the second clause of this third sentence uses the term "such" subsidiary company. This reference obviously is to the same kind of a subsidiary as that specified in the first clause. Yet it goes on expressly to eliminate, for the purpose of this second clause, companies which are holding companies. This express exclusion in the second clause of subsidiary companies which are also holding companies is another clear recognition that Congress recognized that a company might be both a subsidiary company and a holding company, and a further recognition that the term "subsidiary company" in the first clause includes subsidiary companies which are also holding companies. To the possible suggestion that while subsidiary companies which are holding companies are comprehended by the first clause, subsidiary companies which are *registered* holding companies are not, I think it need only be said that by definition the "holding company" is not defined to the exclusion of a "registered holding company."

I fully recognize that principles of statutory construction support the proposition that where an interpretation thwarts the objective and purposes of an act consideration should be given to the reason for the enactment and that inquiry should be made into its antecedent legislative history. To this I reply only that I do not believe that my construction is inimical to the objectives of the act—indeed, there is reason to believe that it is quite consistent with it; that there exists no helpful evidence of legislative

[29] E. g. §§ 9 (b) (2) and 9 (c). Cf. § 3 (a) where the word "any" is used.

intent, for the legislative history is fairly equivocal; and finally that I do not feel that there is any ambiguity in the words which we are called upon to interpret. It must be remembered that our duty is only the subordinate function of reducing terms of a statute to meet a specific situation; to give meaning and content to the inert words of the statute. In reply to the suggestion that my construction leaves a gap in the statute I say only that the responsibility for this gap lies with Congress and that I am merely giving recognition to the words of the act as I find them.

I am not prepared to admit, however, that this is an inadvertent omission, if an omission it be. I am inclined to believe that Congress purposefully selected these words because it desired not to encroach upon the jurisdiction of state Commissions and thus desired to grant an exemption from our act to the issue and sale of securities which were subject to the approval of a state Commission.[30] Lack of effective state regulation was one of the reasons for the enactment of the Public Utility Holding Company Act. But where complete regulation by a state Commission is present it may well be that it was not intended that we have jurisdiction to refuse to approve an issuance of securities.

The Report of the Conference Committee[31] recites that § 6 (b) "directs the Commission to exempt the issue of securities by subsidiary companies in cases where holding company abuses are likely to exist." In the instant case I feel that abuses are unlikely to exist. Though West Penn Power Company is not "predominantly" a public utility company it is more an operating company than a holding company. Its operations and financing are fully subject to the jurisdiction of the Pennsylvania Public Utility Commission, which Commission will have to pass on all aspects of the instant financing. In addition, this Commission has authority to impose "such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers."[32] Furthermore, the activities of West Penn Power Company are subject to our jurisdiction except in those very few instances where the act grants it an exemption; all of its activities and relations with its subsidiaries are subject to our jurisdiction under the provisions of § 12. Accordingly, I do not believe that my construction in this case will give rise to any abuses which the act was designed to eliminate.

One question remains. What terms and conditions must be imposed in order to protect the public interest and that of investors? In addition to the conditions customarily imposed in § 6 (b) proceedings I think we should require West Penn *plainly* to set forth in its prospectus (perhaps by reprinting excerpts from the Commission's findings; certainly mere statements in a footnote to a balance sheet are inadequate) that (1) the aforementioned inflationary items exist in its property account and in its investments account; (2) the sale of 160,000 shares of common stock will result in "fattening" the presently outstanding common stock as above indicated; (3) the sale price represents about seventeen

[30] Cf. Palmer v. Massachusetts, *supra*.
[31] H. R. Rep. 1903, 74th Cong. 1st Sess. (1935) at p. 67.
[32] Cf. United States v. Lowden, *supra*.

times earnings; and (4) pending rate case. The condition which the majority has imposed seems to cover these matters.

ORDER

West Penn Power Company, a registered holding company and a subsidiary company of American Water Works and Electric Company, Incorporated, a registered holding company, having filed a declaration pursuant to § 7 of the Public Utility Holding Company Act of 1935 regarding the issue and sale of $3,500,000 first mortgage bonds, Series K, 3 per cent, due March 1, 1970, and 160,000 shares of common stock, no par value, and regarding certain changes in the rights of the outstanding common stock;

A public hearing having been held on such declaration after appropriate notice; the Commission having considered the record in this matter and having made and filed its findings and opinion herein;

It is *ordered* that said declaration be permitted to become effective forthwith subject, however, to the following conditions:

(1) That all acts in connection with said declaration shall be performed in all respects as set forth in and for the purposes represented by said declaration.

(2) That the declarant shall cause those parts of the Commission's findings and opinion in this proceeding appearing under the captions "Property and Investment Account," "Ratios to Property and Investment Accounts," and "Summary of Certain Adverse Factors" to be incorporated into or physically attached to the prospectus issued by the declarant in connection with the sale of the common stock.

(3) That within ten days after the issue and sale of the securities in question the declarant shall file with this Commission a certificate of notification showing that such issuance and sale have been effected in accordance with the terms and conditions of, and for the purposes represented by, said declaration.

NEBRASKA SUPREME COURT

Nelson-Johnston & Doudna

v.

Metropolitan Utilities District

[No. 30703.]

(— Neb —, 291 NW 558.)

Municipal districts, § 1 — Nature of functions — Municipal corporation.

1. A district organized under the provisions of Arts. 10 and 11, Chap. 14,

Comp. Stats. 1929, is a public corporation empowered to perform functions usually performed by cities of the metropolitan class and is, in its broader sense, a municipal corporation, p. 61.

Municipalities, § 3 — Express and implied powers.

2. A municipal corporation may exercise only such powers as are expressly granted, those necessarily or fairly implied in or incidental to powers expressly granted, and those essential to the declared objects and purposes of a municipality, p. 62.

Statutes, § 19 — Construction — Municipal powers.

3. Statutes granting powers to municipalities are to be strictly construed, and where doubt exists such doubt must be resolved against the grant, p. 62.

Municipal districts, § 4 — Gas — Express and implied powers.

4. But where a power is granted to a municipality in its proprietary capacity, such as the power to manufacture, sell, and distribute gas, the power is implied to do whatever is reasonably necessary to effectuate the purposes and objects for which the grant of power was made, p. 62.

Municipal districts, § 1 — Proprietary operations — Powers.

5. The authority given a municipality to engage in the operation of a business enterprise carries with it the power to conduct it in the same manner in which a private corporation would deal with its property under similar circumstances, p. 62.

Municipal districts, § 1 — Gas — Sale of appliances.

6. A municipal corporation having the power to manufacture, sell, and distribute gas to its inhabitants, has the implied power to engage in the selling of gas appliances, such business being intimately connected with and incidental to the sale and distribution of gas, in that it directly and proximately tends to accomplish the general purpose and object for which the primary power was granted, p. 62.

[April 12, 1940.]

Headnotes by the COURT.

APPEAL *from judgment dismissing complaint and sustaining demurrer in suit to enjoin utilities district from selling gas appliances; affirmed.*

APPEARANCES: Leon, White & Lipp, of Omaha, for appellant; Dana Van Dusen, of Omaha, for appellee; A. G. Humphrey, of Mullen, J. R. Mueller, of Syracuse, Beeler, Crosby & Baskins, of North Platte, Paul C. Holmberg, of Grand Island, J. C. Reavis, of Falls City, Thomas Stibal, of Schuyler, A. J. Denney, of Fairbury, John E. Mekota, of Crete, Clyde Barton, of Pawnee City, Harry K. Livingston, of Tecumseh, C. R. Stasenka, of Wilber, P. M. Everson, of Wymore, John Ferneau, of Auburn, C. A. Sorensen, of Lincoln, and C. N. McElfresh, of Columbus, amici curiæ.

Heard before Simmons, C. J. Rose, Paine, Carter, Messmore, and Johnsen, JJ., and Ellis, District Judge.

CARTER, J.: This is an appeal from a decree of the district court for Douglas county sustaining defendant's general demurrer to plaintiff's petition filed to secure an injunction against alleged unlawful trading on the part of the Metropolitan Utilities District of the city of Omaha. The plaintiff refused to plead further and plaintiff's petition was thereupon dismissed. Plaintiff appeals.

The plaintiff is a corporation with its principal place of business within the territory served by the Metropolitan Utilities District, a taxpayer of the city of Omaha and a patron and user of the gas and water facilities of the district. The defendant is a municipal corporation created and existing under the laws of the state of Nebraska (Comp. Stats. 1929, §§ 14–1001 to 14–1030 and 14–1101 to 14–1105) and empowered by such laws to engage in the business of supplying the inhabitants of the city of Omaha and surrounding territory with water and gas, and to manufacture and produce coke and by-products in connection with the operation of its gas plant, and to sell and deliver the same to its customers.

The record shows that plaintiff is now and for many years has been engaged in the sale at retail of gas ranges, gas stoves, gas heaters, mechanical refrigerators, and other household appliances in the city of Omaha. Plaintiff further alleges that the defendant district is now operating a retail appliance store in the city of Omaha and is selling and offering for sale gas stoves, gas ranges, gas heaters, mechanical refrigerators, and other household appliances, that defendant carries on an extensive advertising campaign, including the giving to its customers free merchandise and articles used in connection with the cooking and preparation of foods, and that it extends to its patrons unusual and long terms of credit on merchandise sold which private competitors cannot meet. It is further alleged that there are numerous private mercantile establishments engaged in the gas-appliance business in the city of Omaha, that there is no scarcity of such appliances and that there is no price fixing by dealers, combinations, or trusts to stifle competition or thwart the beneficent results of free enterprise.

Plaintiff contends that defendant is unlawfully engaging in the gas-appliance business contrary to the statutory law of this state and to the damage of the plaintiff, and that it is entitled to an injunction restraining the unlawful acts of this defendant in carrying on such gas-appliance business.

[1] The defendant is a municipal corporation created by statute to take over, control, and operate the artificial gas system of the city of Omaha, and other public utilities. Keystone Investment Co. v. Metropolitan Utilities Dist. (1925) 113 Neb 132, 202 NW 416, 37 ALR 1507. A noted textwriter defines a municipal corporation as follows: "We may, therefore, define a municipal corporation in its historical and strict sense to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal

concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper. The phrase 'municipal corporation' is used with us in general in the strict and proper sense just mentioned; but sometimes it is used in a broader sense that includes also public or quasi corporations, the principal purpose of whose creation is as an instrumentality of the state, and not for the regulation of the local and special affairs of a compact community." 1 Dillon, Municipal Corporations, 59. While the Metropolitan Utilities District does not have all the attributes of the municipal corporation strictly defined, yet it performs the functions of a municipal corporation and in its broader sense is a municipal corporation.

[2] The rule has long been established in this state that a municipal corporation "possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable." Christensen v. Fremont (1895) 45 Neb 160, 63 NW 364, 366. See, also, Consumers' Coal Co. v. Lincoln (1922) 109 Neb 51, 189 NW 643; Schroeder v. Zehrung (1922) 108 Neb 573, 188 NW 237.

The right to own and operate a water plant was first granted to the city of Omaha by special enactment of the legislature. Subsequently, the control and management was lodged with the defendant district. The right to own and operate a gas-manufacturing plant and distribution system was likewise added to the powers and duties of the district. The effect of these statutes is to create a governmental agency which has for its purposes the control and operation of the proprietary functions which ordinarily would have been performed by the city of Omaha. It seems to us, therefore, that the powers of the district must be tested on the same basis as if being performed by the city itself. It is conceded that there is no power granted by express provision of any statute permitting the district to engage in the sale of gas appliances. The question resolves itself into one as to whether the right to engage in the sale of gas appliances can fairly be implied from the powers granted. In other words, does the fact that the district is authorized to manufacture, sell, and distribute gas to the inhabitants of the district imply the power to sell gas appliances?

[3–6] The powers granted to a municipal corporation can be divided into two general classes—the one including those which are legislative, public, or governmental, and import sovereignty; the second, those which are proprietary or quasi private, conferred for the private advantage of the inhabitants and the city itself as a legal entity. Where the legislature creates a separate municipal corporation to perform the functions of a city usually regarded as proprietary, such municipal agency is just as much engaged in proprietary functions as if the city was doing it itself. We must, therefore, construe the granted powers as proprietary in character as dis-

tinguished from a governmental grant of authority. We think that a grant of power to a municipal corporation in its proprietary capacity stands upon the same footing as a similar grant to a private corporation by its charter. The grant of power to control and operate a public utility necessarily implies all the incidental powers to do anything that any business man or corporation ought to do in operating a successful business enterprise. Certainly, a private corporation engaged in the manufacture and distribution of gas may sell gas appliances to the purchasing public. The sale of such appliances by private utility companies tends to increase the volume of gas sales and thereby increases the economic efficiency of the corporation. Such results are likewise necessary to the proper operation of a municipally owned business. Applying the same rule to the proprietary powers of a municipal corporation as to the powers enjoyed by a private corporation, we conclude that the defendant district has the implied power to engage in the gas-appliance business. Whether such municipal corporation in its proprietary capacity may engage in the sale of such appliances at a loss, or where it will create an indebtedness against the district, or permanently impair the income of the district derived from the sale of gas, we do not find it necessary to answer in this case. We merely hold that under the facts presented to us the defendant district has the implied power to engage in the gas-appliance business.

It has been held that a municipality authorized to own and operate an electric-light plant has the implied power to sell electrical appliances. Andrews v. South Haven (1915) 187 Mich 294, 153 NW 827, LRA1916A 908, Ann Cas 1918B 100. It has also been held that a municipality engaged in operating a power and light plant may sell its excess steam and install the appliances necessary to enable it to meet the demand. Milligan v. Miles City (1915) 51 Mont 374, 153 Pac 276, LRA1916C 395. A municipality, in installing electric wiring in private houses for purposes of furnishing electricity for electric ranges, stoves, etc., is governed by the same laws and could exercise the same rights as a private corporation engaged in the same business. Hamler v. Jacksonville (1929) 97 Fla 807, 122 So 220.

In Henry v. Lincoln (1913) 93 Neb 331, 338, 140 NW 664, 667, 50 LRA(NS) 174, this court said: "In the light of the above authorities, we conclude that, in the installation and management of its waterworks system defendant must be treated as a private corporation engaged in purely business enterprise, as separate and distinct from the performance of its governmental functions and corporate duties as if it were not a municipal corporation at all, and that its liability to plaintiff must be determined solely under the law and procedure applicable to a private corporation and its employee." The rule was subsequently followed in University Place v. Lincoln Gas & E. L. Co. (1922) 109 Neb 370, PUR1923B 789, 191 NW 432, and Cook v. Beatrice (1926) 114 Neb 305, 207 NW 518. We think this is a clear indication of the rule to be applied in the instant case.

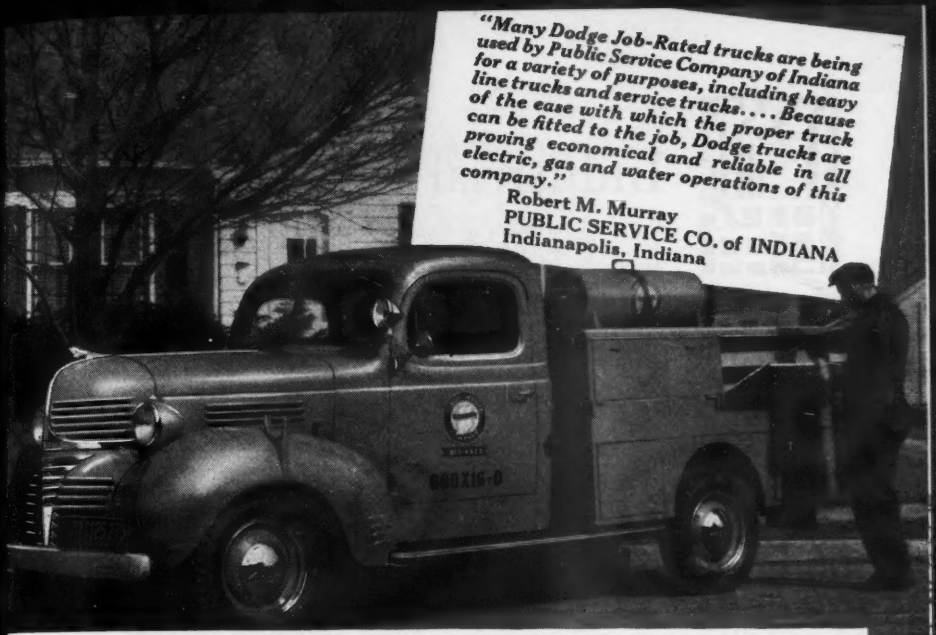
When a municipal corporation engages in a business enterprise which is reasonably necessary to the performance of its public duty, or which materially advances it, or even where the enterprise merely affords the public greater convenience in the use of the municipality's facilities, the participation in such an enterprise is, by the weight of authority, held to be a power implied from or incidental to its expressly granted powers. Certainly no private company could await the initiative of its prospective customers, nor the efforts of others, to sell appliances before doing business. It would have to rely upon its own efforts in this respect. A municipality engaged in the gas business must meet the same problems. Until the district is equipped with gas appliances, there could be no gas business.

We think the correct rule is: If a municipal corporation legally acquires a public utility plant, with the right to operate it for the benefit of its inhabitants, it would likewise acquire by implication the right to do all the things that a private owner might do in order to economically and efficiently furnish to the citizen the product in which he deals. The sale of gas-appliances by the defendant district is intimately connected with and incidental to the sale of gas, and is, therefore, an implied power of such district because it directly and proximately tends to accomplish the general purpose for which the district was established and operated. This, in our judgment, states the more modern rule adopted by a majority of the states which have passed on the question.

We have examined the cases arriving at a contrary conclusion, including MacRae v. Concord (1937) — Mass —, 6 NE(2d) 366, 108 ALR 1450; Keen v. Mayor of Waycross (1897) 101 Ga 588, 29 SE 42; Attorney General v. Leicester (1910) 2 Ch Div(Eng) 359; In Re Opinion of the Justices (1938) — Mass —, 23 PUR(NS) 349, 14 NE(2d) 392, 115 ALR 1158, and Adie v. Mayor of Holyoke (1939) — Mass —, 21 NE(2d) 377. These cases invoke the strict construction usually applied to grants of governmental powers to a municipality. We are unwilling to follow so strict a construction in dealing with statutes granting powers to a municipality in its proprietary capacity.

We conclude therefore that the trial court properly sustained the demurrer to plaintiff's petition.

Affirmed.



STEP INTO THE MONEY SAVING CLASS WITH DODGE *Job-Rated* TRUCKS

LOOK! COMPARE DODGE WITH THESE "OTHER TWO" LOW-PRICED TRUCKS. *DODGE OFFERS FAR WIDER SELECTION*

COMPARISON	DODGE TRUCKS	OTHER TWO TRUCKS	
		TRUCK "A"	TRUCK "B"
Number of ENGINES	6	1	3
Number of WHEELBASES	17	9	6
Number of GEAR RATIOS	16	6	9
Number of CAPACITIES	6 ½ to 3-Ton	3 ½ to 1½-Ton	4 ½ to 1½-Ton
Number of STD. CHASSIS and BODY MODELS	106	58	42
PRICES begin at	$468	$452	$475.88

Prices shown are for ½-ton chassis with flat face cowl delivered at Main Factory, federal taxes included—state and local taxes extra. Prices subject to change without notice. Figures used in the above chart are based on published data.

TRUCKS THAT FIT THE JOB—SAVE MONEY!

DODGE *JOB-RATED* TRUCKS are engineered, built and "sized" throughout for one purpose—to FIT THE JOB! And when a truck *fits the job* you can expect savings—on gas and oil, tires and upkeep. Dodge powers each Dodge Job-Rated truck with exactly the *right one* of 6 great Dodge truck engines which include the heavy-duty Dodge Diesel. Each truck has the *right* size clutch, transmission and rear axle to fit it for dependable duty on the job it is built to do. Save money! See your Dodge dealer about low delivered prices. Buy Dodge *Job-Rated* trucks that *fit YOUR job!*

Booklet FREE—READ AND SAVE

Learn how a truck to *fit the job* can save YOU money! Ask your Dodge dealer or write Dodge Division, Chrysler Corporation, Detroit, Michigan

SEE YOUR Dodge Dealer FOR A GOOD DEAL

DEPEND ON DODGE *Job-Rated* TRUCKS

Industrial Progress

Selected information about manufacturers, new products, and new methods. Also news on utility expansion programs, personnel changes, recent and coming events.

New Jersey Utility Expansion Aids Defense Program

FOR the purpose of providing for any emergency power demand as well as for normal growth and the continued maintenance of dependable service in the territory it serves, Public Service Electric and Gas Company has allocated more than $50,000,000 since 1936 for the expansion of its electric facilities in New Jersey, including $9,000,000 for construction work this year.

Included in the major electric construction projects under way is a $12,000,000 extension to the company's Burlington electric generating station in southern New Jersey. This is the first step in an expansion program at this station which, when completed, will have increased the capacity of the station from 55,000 kilowatts to approximately 350,000 kilowatts. At a cost of approximately $7,500,000 the Marion generating station of the company in Jersey City is being expanded, a new 50,000 kilowatt turbine generator and two high pressure boilers being installed. When this work is completed the capacity of the station will have been increased from 94,950 kilowatts to 144,950 kilowatts. At the Essex Station, in Newark, a 50,000 kilowatt machine was put in service in 1938, increasing the capacity of this station to 243,000 kilowatts.

The largest of the company's five generating stations, Kearny Station, located near the Marion and Essex stations, has a capacity of 324,500 kilowatts.

Coöperating in the national defense program, Public Service Electric and Gas Company has begun work on a new substation in Caldwell which, with related construction, will cost the company about $200,000. Although present facilities would be ample to take case of the normal electric requirements of the general area around Caldwell for several years, the company has started construction of the new substation this far ahead of its program for 1943 because a new plant for the Curtiss-Wright Aeronautical Corporation will have to be supplied through this substation.

Electric Steam Iron Offered By The Silex Company

AN electric steam iron which may be used for either steam or dry ironing is announced by The Silex Company, Hartford, Conn.

Well known as the "creators of the Glass Coffee Maker Industry" the Silex Company conceived, developed and styled the new iron within the Silex organization. A no-lift roller bearing stand to be used with the new iron, as well as a small roller bearing stand for all ordinary irons, also is announced by the company.

According to Frank A. Wolcott, president of The Silex Company, the steam electric iron will rapidly replace the ordinary electric iron due to the popularity of rayons and other synthetic materials. A large volume of business already has been booked.

Several patent applications on the new items are now pending.

75,000-KW Turbine for Delray Station of Detroit Edison

AS part of its $12,000,000 expansion program to keep pace with rapidly increasing power load, the Detroit Edison Company has placed an order with General Electric for a 75,000-kw turbine-generator. The turbine-generator is scheduled for shipment to Detroit Edison's Delray station late in 1941.

The new unit will be a duplicate of the two General Electric 75,000-kw turbine-generators installed at Delray in 1938 and 1939. Like the present units, the new turbine will be rated 100,000 kva, 1800 rpm, 14,400 volts. Designs call for a single-casing, single-flow condensing turbine generator, with steam conditions of 815 lb. gage, and 900 degrees, one inch absolute back pressure.

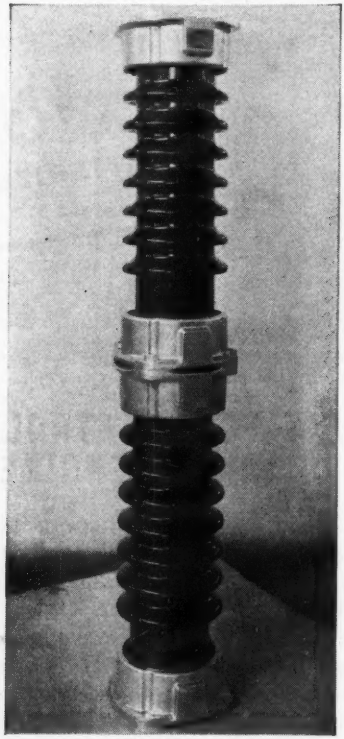
With the new unit, Detroit Edison continues its progressive role in supplying service to its customers with the most modern equipment. This service dates back to the early 1900's, when the Port Huron station installed the first commercial turbine shipped by the General Electric, in 1903.

New England Utility Expands

THE Montaup Electric Company of Somerset, Mass., has placed an order with General Electric for an 1,800-pound-pressure turbine generator, suitable for carrying loads up to 25,000 kilowatts.

Lightning Arresters Designed For Small Substations

A NEW line of type LV unit design lightning arresters covering the range from 20-kv to 73-kv, and designed primarily for the small substation where reliable protection at low cost is the watchword, is announced by the Westinghouse Electric & Manufacturing Co. Complete arrester units 20, 25, 30, and 37 kv consist of three inch diameter porous block elements, and a multiple series gap of resistance type spacers, and metal electrodes. Entire assembly is encased in wet process porcelain, hermetically sealed.



Type LV 50-kv Lightning Arrester

Following unit design practice, units above 37-kv consist of combinations of two single units, for instance, a 40-kv arrester would consist of two 20-kv units, etc.

Features include absolute moisture proofing, brought about by the solder hermetical seal at each end casting. Greatest improvement is in protective ability against lightning, every arrester being guaranteed to discharge at least 65,000 surge amperes on a 5-10 microsecond wave. This is possible because of the three inch diameter resistance blocks, formerly used only on arresters rated 50 kv and above. Gap breakdown is uniform and stabilized by the resistance type spacers and metal electrodes. To insure their handling "long-tail wave" lightning, and freedom from radio interference each arrester is tested in the laboratory under rated power voltage.

Self-supporting, they may be mounted directly on transformers, or other equipment. Where small clearances prohibit this, mounting brackets may be used and are obtainable.

An 8 page illustrated booklet listing and describing the additions to the line of type LV lightning arresters can be obtained from the Westinghouse Electric & Manufacturing Company, East Pittsburgh, Pa.

Vari-Typer Model Designed For Secretarial Use

A NEW Vari-Typer machine—the Secretarial Model—is announced by the Ralph C. Coxhead Corporation, 333 Sixth Avenue, New York City.

Commemorating the 60th anniversary of the invention of a writing machine with changeable types (Vari-Typer formerly was called the Hammond) this new secretarial model brings the advantages of Vari-Typer into a new price range, according to the manufacturer.

This new model is built by the same specifications as the standard composing models of the Vari-Typer which carries two type faces at one time but permits the substitution of other segments of different styles and sizes of types. This is a feature found only on Vari-Typer. The secretarial machine has an electric motor drive, a light aluminum frame, rubber keys, automatic reversible ribbon feed, variable line finder and tabular mechanism. It weighs only 22 pounds.

This new model Vari-Typer is ideal for writing stencils, typing distinctive correspondence, typing on cards or other special-size stock, writing financial statements, preparing master copy for duplicators and many other uses employing foreign or special type.

An illustrated folder describing the many features of the Secretarial Model Vari-Typer can be obtained from the manufacturer.

Pyranol Induction Regulators

THE extension of Pyranol to induction voltage regulators has been announced by the General Electric Company. Pyranol, a

synthetic, noninflammable liquid with high stability characteristics, has been used as an insulating and cooling liquid for G-E Pyranol transformers, and as a dielectric treating and filling material for G-E capacitors, since 1932.

All the features of the well-known General Electric oil-filled induction regulators are incorporated in the Pyranol line, which is available in all standard ratings.

With the advent of General Electric Pyranol induction voltage regulators, the costly fireproof vaults normally required for indoor installations are no longer needed. In addition, Pyranol's noninflammability often permits the placing of these regulators in convenient out-of-the-way places which would be unsuitable for oil-filled units.

Pennsylvania Bell Steps Up Construction Budget

BELL Telephone Co. of Pennsylvania has stepped up its 1940 construction program to $25,207,000 from an estimate made at the beginning of the year of $23,463,000, according to Philip C. Staples, president. The company is now engineering and constructing on the revised estimate. In 1939 the company's construction expenditure amounted to $17,898,250.

Commenting on the gain in telephones for the first half of 1940 of 27,451, Mr. Staples said that during the early part of this year the company moved ahead at a considerably faster pace than last year and pointed out that in the past three months the increase over last year was somewhat slower. In the first half of 1939 the company's gain in telephones totaled 21,474.

Dodge Appoints Cosart Truck Sales Manager

APPOINTMENT of Lee D. Cosart as sales manager of the truck division, Dodge Brothers Corporation, is announced by Forest H. Akers, vice president of Dodge.

Mr. Cosart relinquished the position of general sales manager of Plymouth to assume direction of the indicated broad merchandising potentialities just ahead in the truck business.

Mr. Cosart's appointment fills a vacancy created by the resignation recently of T. W. Moss, formerly director of Dodge Truck sales.

Billion Dollar Industrial Research Fund Asked

CALLING for a billion dollar industrial research fund to create new jobs, industries, goods and services for "tomorrow," Dr. Karl T. Compton, President of the Massachusetts Institute of Technology, recently urged all companies in the United States to spend two per cent of their gross income for research.

One hundred eighty-eight companies were surveyed by the National Association of Manufacturers Advisory Committee on Scientific Research, of which Dr. Compton is chairman. While the results of the inquiry revealed that ten companies spent over 10 per cent of their gross income for research, the broad average of all the companies' expenditures was 2 per cent, the figure which Dr. Compton believes would open up new vistas of enterprise for the future.

If all the companies in the United States spent two per cent of their gross income for research, Dr. Compton pointed out, the total would amount to more than a billion dollars a year—probably five times as much research as is being done now.

Wisconsin Electric Plans $7,000,000 Expansion

THE Wisconsin Electric Power Co., has completed plans to order equipment for 80,000 kilowatts additional capacity at the Port Washington plant, near Milwaukee.

The new facilities, it was reported, will cost approximately $7,000,000 and bring the North American's construction program to close to $100,000,000 from the figure of $90,000,000 established as of the end of June.

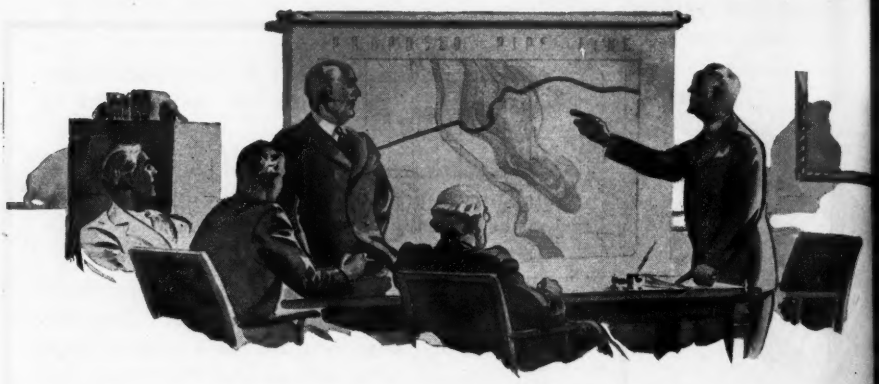
North American proposes to increase its system's generating capacity to a level adequate for any demand which can be foreseen over the next few years.

Fluorescent Road Show

A ROAD show devoted to Fluorescent lighting is being presented in 40 major cities throughout the country by the Westinghouse Electric & Manufacturing Company.

Four traveling units are touring the country from San Francisco to New York, from New Orleans to the Great Lakes, exhibiting the latest in Fluorescent lamps and fixtures for industrial and commercial use. Lectures will be given explaining and clarifying Fluorescent lighting. The road shows which started the second week in July will be continued until August 21st.

Two separate presentations in each town will be given. The first will be limited to the Westinghouse Sales Organization, including the Westinghouse Electric Supply Company's personnel in each territory. The second presentation will be given for utility lighting men, electrical contractors and electrical and lighting dealers.



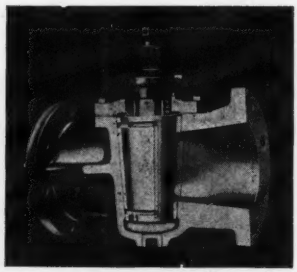
...So they invested $40,000 more and gained a valve bargain

A costly pipe line was recently installed involving the purchase of valves running into six figures. Valve bids were called. The Nordstrom Valve bid was approximately $40,000 more than for ordinary valves. The purchasing board favored the lower quotations.

"I'd like to see us choose Nordstroms, but $40,000 is a lot of money. Maybe we had better save it and take a chance," declared one of the officials.

"H'm, there must be a good reason why Nordstroms are so extensively adopted for pipe lines," commented a director of the company. "But," he continued, "I think we can use the cheaper valves. They won't be operated more than once or twice a year, maybe not that often."

Finally the Line Superintendent was invited to present his recommendations. "A single valve failure could cost us more than $40,000," he commented. "Personal injuries as well as material losses can occur. Who will take the responsibility? Some of these valves won't be closed once in five years, then, no doubt, only for an emergency. A valve with exposed seats might corrode. Stuff can settle in the recesses, so it can't close tightly. From my observation Nordstrom Valves will always open or close, no matter for how many years they are untouched," he declared.



It isn't the price of a valve that counts; it's the service it renders. Choose Nordstroms. They keep up-keep down.

This set the officials to thinking. They investigated.

The result? Nordstrom won the order. Yet, even though the valves cost $40,000 more, the savings in upkeep and the safety insurance for decades to come will *far offset* this extra initial investment.

MERCO NORDSTROM VALVE CO.

A Subsidiary of PITTSBURGH EQUITABLE METER CO.

WORLD'S LARGEST MANUFACTURERS OF LUBRICATED PLUG VALVES; GASOLINE, OIL & GREASE METERS

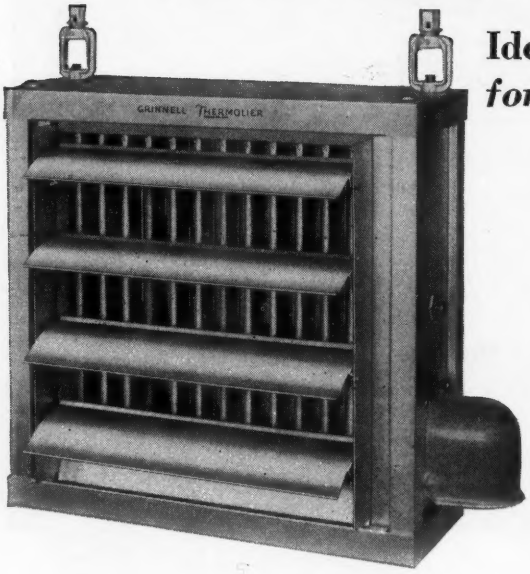
Branches: *Main Offices:* 400 Lexington Ave., PITTSBURGH, PENNA.

New York City, Buffalo, Philadelphia, Columbia, Memphis, Chicago, Kansas City, Des Moines, Tulsa, Houston, Los Angeles, Oakland. *Canadian Licensees:* Peacock Bros., Ltd., Montreal. *European Licensees:* Audley Engineering Co., Ltd., Newport, Shropshire, England.

PRODUCTS: Nordstrom Plug Valves • Nordstrom Air, Curb and Meter Cocks • Nordstrom Valve Lubricants • EMCO Gas Meters • EMCO-McGaughy Integrators • EMCO Regulators • Pittsburgh Meters for Gasoline, Grease, Oil, Water and other Liquids • Raybould Couplings • Stupakoff Bottom Hole Gauges

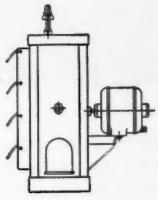
SELL COMFORT for isolated spots

GRINNELL ELECTRIC TYPE THERMOLIER OFFERS UNUSUAL OPPORUNITIES AS A LOAD BUILDER



Ideal Heating Equipment *for:*

TEMPORARY CONSTRUCTION
BRIDGE CONTROL HOUSES
VALVE HOUSES
GATE KEEPERS' HOUSES
FILLING STATIONS
PARKING LOTS
GARAGES
DRYING PROCESSES
WAITING ROOMS
CRANE CABS



Grinnell Thermolier, Electric Type, opens new markets for efficient heating in isolated spots.

It provides simple, easy installation. Consider it either for your own plants or as a top-notch specialty for your Sales Department. The specially built electric fan combined with a protected heating element assures a full measure of even heat. Six sizes and capacities. Write for full details. Grinnell Company, Inc., Executive Offices, Providence, R. I. Branch offices in principal cities of the United States and Canada.

THE HEATING ELEMENTS

G-E Strip Heaters, specially built, with protective coating good for 1000° F, mounted to allow for expansion, protected against over-heating by thermal over-load cut-off which disconnects heating element if fan stops. Cut-off easily reset by a button control.

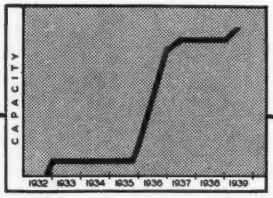
GRINNELL THERMOLIER

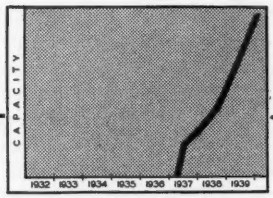
THE UNIT HEATER WITH 14 POINTS OF SUPERIORITY

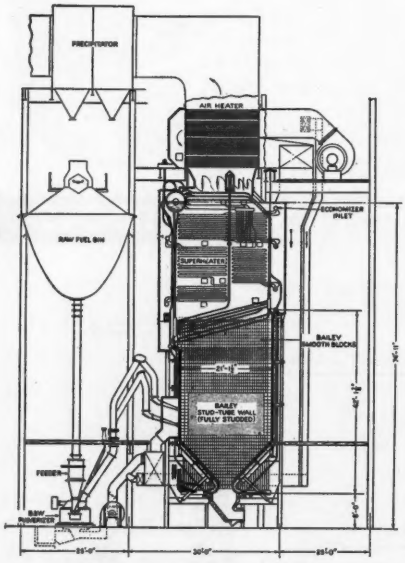
Trend of

The illustrations on these pages show the trend in design of B&W Boiler units for central-station service and the rate of acceptance of each design as indicated by the charts showing the cumulative total of steam-generating capacity ordered.

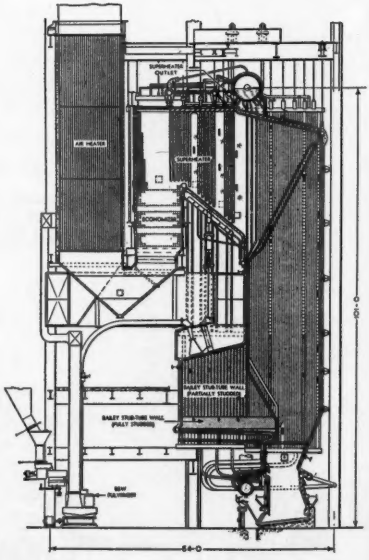
The charts indicate that when new types of equipment, such as boilers, show in operation unmistakable evidence of fundamental







Twenty B&W High-Head Boilers in service or on order have a combined capacity of almost 8,000,000 lb. of steam per hr.



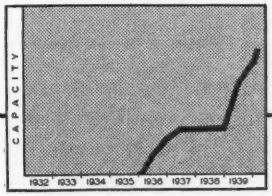
Twenty-two B&W Radiant Boilers having a total capacity of over 8,500,000 lb. of steam per hr. are in service or on order.

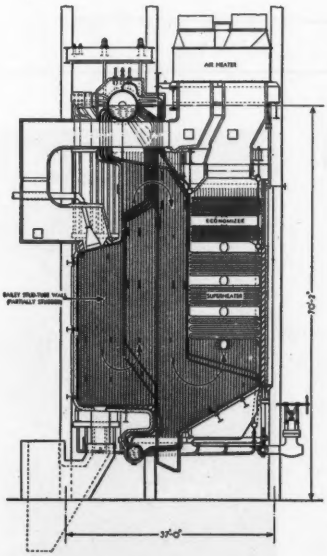
THE BABCOCK & WILCOX COMPANY... 85 LIBERTY STREET... NEW YORK, N. Y.

Boiler Design

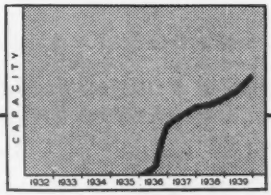
soundness, and the manufacturer has the reputation of standing solidly back of his product, they are readily adopted.

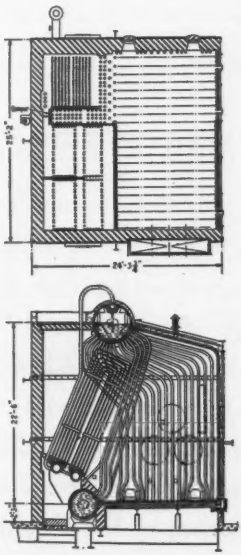
Companies that have installed boilers of these types enjoy the benefits to be derived from the use of equipment designed to meet today's new and exacting operating requirements–through the use of design principles that are advanced yet of demonstrated soundness.





Fourteen B&W Open-Pass Boilers having an aggregate capacity of over 6,000,000 lb. of steam per hr. are in service or on order.





Forty-four Integral-Furnace Boilers in service in, or on order for, central stations have a total capacity of over 5,000,000 lb. of steam per hr.

BABCOCK & WILCOX

G-173.Y

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"Sorry, I'm not going—I'll be shopping instead!"

"HIS SPEECH at the club luncheon is going to be about advertising, and I know just what he's going to say. I've read his book.

"He's *against* advertising . . . says it adds to the cost of living . . . that it misleads and deceives the public.

"Tommyrot! Dad's first car cost more than two thousand dollars. Ours cost less than half that much and it's a better car.

"Our first package of corn flakes was fifteen cents. Now we get *two bigger* packages for fifteen cents and they reach us fresher and crisper.

"Mother wore silk stockings only on Sundays because they cost so much. I wear them every day!

"I think the lecturer is all wet. Tell him I wouldn't enjoy his speech. The only ad I ever read that sold me a poor bill of goods was the one about his book."

★ ★ ★ ★ ★

Venomous books and speeches, in which radical agitators attack advertisers, have been much in fashion these last few years. But the novelty is wearing off and interest wanes as one after another of the attackers figures prominently in the findings of the Dies Committee.

Advertising is not a sinister something to suspect. It is just a part of selling, a proved method of increasing business activity—a condition we've all been praying for since 1930.

It has introduced new luxuries and improved necessities in towns and villages at the same moment as in the great metropolitan centers.

It has played a leading part in lifting home drudgery from the backs of women, putting the nation on wheels, improving our diet, hygiene and appearance. By stimulating mass production it has brought down the cost of the things we buy. It has helped keep our factories busy, our people at work.

Let's cheer advertising on. Help it to give business a lift. *What helps advertising helps you.*

This message is published by

NATION'S BUSINESS

It is the 43rd of a series contributed to a better understanding of free enterprise. If you believe that advertising is a good thing and should be encouraged, why not say so plainly when you hear it slandered?

THIS DURABLE CONDUIT

COSTS LESS TO INSTALL

Uniformly strong and durable, J-M Transite Conduit retains its true form under sustained loads—requires no concrete envelope underground or in exposed locations. Its long, light lengths are easily handled, rapidly installed.

COSTS LESS TO MAINTAIN

Made of asbestos and cement, Transite Conduit is highly resistant to smoke, acid fumes, weather and corrosive soils. It will not rust, rot or decay, is completely incombustible. Maintenance costs are kept to a minimum.

RETAINS ITS SMOOTH BORE

The original smooth interior of Transite Conduit *stays* smooth. Joints are tight and snug—free from jagged obstructions. Cable pulling is easier—long pulls may be made without injuring the sheath. cables are easily removed.

You should have complete information about Transite Conduit and its thinner-walled companion product J-M Transite Korduct. Write for Brochure DS-410. Johns-Manville, 22 East 40th Street, New York, N.Y.

Johns-Manville TRANSITE CONDUIT

PROFESSIONAL DIRECTORY

• This Directory is reserved for engineers, accountants, rate experts and others equipped to serve utilities in all matters relating to rate questions, appraisals, valuations, special reports, investigations, design and construction.

PROFESSIONAL DIRECTORY (*continued*)

INDEX TO ADVERTISERS

[The Fortnightly lists below the advertisers in this issue for ready reference. Their products and services cover a wide range of utility needs.]

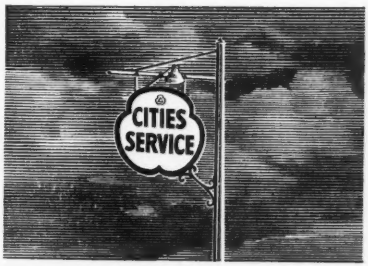
*Fortnightly advertisers not in this issue.

BETTER PRODUCTS...

because Cities Service knows your problems!

Cities Service Oil Company engineers are concentrating their efforts daily on solving the various lubrication problems with which industry is faced.

Wherever moving surfaces come together, no matter what the speed or load, Cities Service can recommend authoritatively the correct lubricants to use. Whether you need heavy greases for massive gears or the lightest of oils for delicate precision machines, Cities Service is ready to fill your every need.



Cities Service engineers will be glad to discuss your lubrication problems with you.

CITIES SERVICE INDUSTRIAL OILS

Compressor Oils
Cutting Oils
Diesel Engine Oils
Cylinder Oils
Star Ice Machine Oils
Leather Finishing Oils
Loom Oils
Marine Engine Oils
Quenching and Tempering Oils
Sewing Machine Oils
Spindle Oils
Transformer Oil
Turbine Oils
Wool Oils

Hour of Stars—The Cities Service Concert with Lucille Manners, Ross Graham, the Cities Service Orchestra and Singers under the direction of Frank Black, broadcast every Friday evening at 8 P.M., E. D. T., over the N. B. C. Red Network.

A MILLION STRANDS IN A 1" PILE

A SPACE an inch wide and an inch high will take more than 1,562,000 strands of wire used in the smallest Westinghouse watthour meters. And tiny watch-wheel shafts being made by this operator are almost as fine—to bring unmatched precision to Westinghouse meters. These meters, so carefully made, render vital service on power lines, measuring with unfailing exactness, 24 hours a day, the current that passes to your customers. Costly under measurements are thus avoided and customer good will is insured.

Westinghouse activities in research, in the manufacture, distribution and application of apparatus, and in promoting the use of electricity, result in better service to you and a wider use of electricity by your customers. They have been made possible and are continually encouraged by your purchases of Westinghouse apparatus.

WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY, EAST PITTSBURGH, PA.

Tune in "Musical Americana," N. B. C. Network, Coast-to-Coast, every Tuesday evening.

Westinghouse

ELECTRICAL PARTNER OF THE CENTRAL STATION